80-1500

Pet. No._____

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SUPREME COURT OF THE UNITED STATES

October Term 1980

GEORGE CLIPPER, Petitioner,

v.

GRANT STARKEY
And
NATIONAL PERMANENT
SAVINGS AND LOAN ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 3, 1981

QUESTIONS PRESENTED

1. Where in any action under the federal civil rights statutes or Constitution, one basis of damage liability for an unconstitutional arrest, seizure and detention rests on actions involving more than simple negligence --- an issue unresolved by Procunier v. Navarette[*] and reserved in Baker v. McCollan[**] --- and where those acts, initiated and effected by a police officer and others, resulted in the extended incarceration of an admittedly innocent citizen for attempted murder of a police officer, robbery and kidnapping, the striking of negligence claims under the civil rights statutes and directly under the Constitution erroneously

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[*] 434 U.S. 555, 98 S.Ct. 855 (1978).

[**] 443 U.S. 137, 99 S.Ct. 2689 (1979).

misreads them, in that the actions causing the unconstitutional wrong, taken either separately or together, exceeded simple carelessness or forgetfulness and included such matters as a one-man photographic showup, plain violations of defendants' own standards for arrests and identifications, and particularly the unjustified failure before the arrest to view or use immediately available moving pictures of the true criminal or to interview known and readily accessible alibi witnesses.

2. Whether and to what extent federal claims resting on deprivations of civil and constitutional rights may be asserted by selection, synthesis and use of substantive state principles under 42 U.S.C. 1988 or Bivens,*/ and which will

*/ Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971).

result in the most favorable recognition of the federal damage remedy, in this instance "false arrest" concepts, while rejecting other state principles which as a matter of state law would preclude such use (in this instance, requiring a claim of "malicious prosecution" instead) in order that federal principles favoring the remedy in federal Courts may be best effected.

LISTING OF PARTIES

The Petitioner is George Clipper, of 5105 - 12th Street Northeast, Washington, D.C. 20011.

The Respondents are:

(a) Grant Starkey, a police officer in Takoma Park, Maryland;

(b) National Permanent Federal Savings and Loan Association, a federally-chartered

national banking association which has various offices in the District of Columbia and State of Maryland. The office involved was at 7633 New Hampshire Avenue, Langley Park, Maryland 20012.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, George Clipper, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on October 10, 1980.

OPINIONS BELOW

Portions of the rulings, findings, and opinions pertinent to our issues and made by the trial Court (the late C. Stanley Blair, Judge of the United States District Court of Maryland) appear in a pre-trial ruling on Motions for Judgment by respondent bank and by way of instructions to the jury and rejected instructions on the negligence and federal remedy theories requested by Petitioner. They are set forth at App. 10-44; 125-127).*/

The October 10, 1980 decision of the United States Court of Appeals for the Fourth Circuit rendered per curiam by Judges Russell, Widener and Phillips is set forth in the Appendix to this Petition at App. 1-8.

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*/ The full charge is at 65-127. Since it could be said that the whole charge must be examined, it appears in the Appendix. The critical factor is denial of the theories through denied instructions at 128-157.

In that decision the Court of Appeals affirmed a jury verdict for the respondents police officer Grant Starkey, and National Permanent Savings and Loan Association ("National Permanent"), but reversed a pre-trial ruling that dismissed the case against Takoma Park, Maryland, a municipal corporation, based on Monell*/ and Owen**/ The Petition relates only to resolved issues concerning respondents Starkey and National Permanent.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 10, 1980 (App. 1, 8).

A "Suggestion for Rehearing En Banc and/or Petition for Rehearing or For Modification of Opinion and Judgment by Panel"

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*/ Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2036 (1978).

**/ Owen v. City of Independence, Missouri, ___ U.S. ___, 100 S.Ct. 1398 (1980).

was timely filed and denied on December 3, 1980.*/

The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States, all set forth in the Appendix to this Petition (App. 213).

The statutory civil rights provisions are 42 U.S.C.§§ 1981, 1983, 1985, 1986, 1988, set forth in the Appendix at 214-215. The jurisdictional provisions are 28 U.S.C. §§ 1331, 1332, 1343, also set forth in the Appendix at 216-217.

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*/The denial of December 3, 1980 appears at App. 9. A portion of that Suggestion for Petition raising the issues here is set forth in the Appendix at App. 198-212.

STATEMENT OF THE CASE

Proceedings Below

This cause began with two suits filed in the United States District Court for the District of Maryland on March 30, 1973 by Mr. George Clipper, a District of Columbia resident, against National Permanent Federal Savings and Loan Association in Civil Action 73-294-B and against Prince George's County, the City of Takoma Park and Grant A. Starkey in Civil Action 73-295-B for constitutional, civil rights and other violations. The assigned judge was the late Honorable C. Stanley Blair. By stipulation of the parties, Prince George's County was later dismissed from the cause on its represen-

tation that it had no involvement whatsoever in the matters asserted in the complaint. Both cases involved a single incident, namely, a robbery at the respondent federally-chartered bank (National Permanent) on May 14, 1971. They likewise involved Mr. Clipper's arrest, confinement, and prosecution for that incident, and what were later admitted to be false charges which flowed from it (kidnapping, armed robbery and assault with intent to kill a police officer). (App. 158-172 re Bank; 173-187 re Starkey).

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*/ Throughout we refer to the Appendix to this Petition as "App." only. Where the matter was in the Court of Appeals Appendix as well, our Petition Appendix here will show that reference as "C.A. App." In most instances we have also given the Record references as well, noted by "R." The complaints noted in our Appendix also appear in the Court of Appeals Appendix at C.A.App. 21-31, Art. 32-41; R. 244-253; R. 6-15. Of particular use is the trial Court's pre-trial summary of facts (App. 10-44) and the Pre-Trial Order (App. 51-58).

Respondent National Permanent was charged with wilful and negligent wrongs which it committed that led to Mr. Clipper's arrest, including improper procedures to prevent identification as well as the negligent and reckless wrongs of its employees committed in giving those identifications and in its concert with the arresting officer, respondent Grant Starkey (App. 51-57). Takoma Park, the city employing the police officers involved, was charged with improper procedures that allowed the wrongful arrest to take place, as well as racial discrimination. This aspect against it was independent of charges against Mr. Starkey, the Takoma Park officer, who, while not on the actual scene of offense, was the one who in fact made the arrest on the day following the incident

(App. 173-187; 51-57).

In May, 1973, Takoma Park filed a Motion to Dismiss Complaint against it based on its immunity from suit. (App. 196-197).

At the same time the respondent Bank filed a Motion for Judgment on the Pleadings which was expanded into a Motion for Summary Judgment (R. 331). No pre-trial Motions were filed by Mr. Starkey.

After hearing argument and considering the Motions, the Court entered a Memorandum Opinion and Order Granting Summary Judgment to Takoma Park and partial summary judgment to the Bank (App. 10-44).

The Appendix includes only that portion necessary to this appeal as it relates to National Permanent and a sum-

mary of what was said as to Takoma Park. In view of the reversal as to the latter, the full reasoning below is not necessary to consider.

Mr. Clipper thereafter filed a Motion to Set Aside or Alter or Amend that Order with Memoranda and Affidavit relating in part to his racial discrimination claims in both cases (R. 166 and R. 417). Each defendant responded and the plaintiff replied (R. 462 Takoma Park and R. 471, National Permanent).

On the basis of the Motion, which in large part contended that the Court's March 25 Order decided issues not before it and was based on a misreading of the record and the issues, the Court vacated its rulings set forth in that 38-page Opinion and Order; at the same time, however, it then granted Takoma Park's

Motion to Dismiss on the issues before it and on the legal contentions raised --- whether or not any suit of this kind could lie against a Maryland city which had not waived its "immunity"; further, it restored some of the action against the Bank; and it consolidated both cases for trial (App. 47-50; C.A. App. 93-96; R. 487, R. 233).

On January 19, 1976, the Court signed the pre-trial order in this case, setting forth the contentions of the parties and the defenses and which forms a part of the rulings below related to the issues here (App. 51-58; C.A.App. 97-104; R. 571-582 in the consolidated record).

A jury trial began on January 27, 1976, continued to February 2, and then was deferred to February 6, at which time

the jury was instructed (R. 651).*/ On February 9, 1976, the jury rendered its judgment in response to a verdict form requiring it to answer certain specific questions. It found that neither National Permanent Federal Savings and Loan Association nor Mr. Starkey was "guilty" of common law malicious prosecution and certain Section 1981-1983-1985 violations --- the only limited issues left in the case by the court (R. 685-686; C.A.App. 156-158 - verdict form).

The judgment order based upon the jury verdict was entered on February 11,

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*/ At the conclusion of the case the Court reserved decision on defendant's Motions. Later, in chambers, it gave counsel its proposed written charge which included its striking of "false arrest and imprisonment" claims, negligent and wilful, and the theories related thereto (App. 62-64; C.A.App. 162A-162B; R. 651).

1976 (R. 687). On March 10, 1976, a timely notice of appeal was filed in both cases and involving each of the appellees at bar (R. 688).

The appeal was pending in the Court of Appeals for about four (4) years while that Court was considering Paxman v. Campbell*/ that in turn was awaiting decision in Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2036 (1978). Following Monell, Paxman was heard en banc.**/ This cause, which was originally joined in the Pax-

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*/ Paxman, et al. v. Campbell, 612 F.2d 846 (4th Cir. 1980).

**/ Paxman was issued en banc on January 2, 1980, some months before Owen, infra. Each member of the panel on the decision at bar (Judges Russell, Widener and Phillips) was in the majority in that case. It held that municipalities had a "good faith" defense in Section 1983 cases.

man cases but later severed, was held on the docket awaiting that decision. Between the date Paxman was issued in January 1980 and notice of oral argument at bar for August 1980, this Court issued its ruling in Owen v. City of Independence, Missouri, ___U.S.___, 100 S.Ct. 1398 (1980).

Petitioner filed a Motion to Supplement the long-filed Briefs because of intervening decisions and principles that arose at oral argument on August 19, 1980; it was denied at the time the decision was issued on October 10, 1980. It referred to the issues here raised.

A timely Suggestion for Rehearing En Banc or for panel rehearing similarly raising the issues here pursued was denied, as noted (App. 9).

The decision of the Fourth Circuit

now at issue affirmed the lower Court rulings that denied the theories of Petitioner's case as to liability for certain kinds of negligence under 42 U.S.C. §§ 1983, 1985 or liability under §1988, presented to the trial court in the pretrial motions and "primarily" by way of denied instructions (Opinion below, App. 7

Reviewing these rulings, the Circuit Court rejected the issues here presented by ruling that there was no reversible error in their denial (App. 7-8).

It did, however, reverse the ruling of Judge Blair dismissing the complaint against Takoma Park and remanded the cause to it (App. 8).*/

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*/ This Petition does not address any relief against Takoma Park nor matters that still may arise in that cause -- e.g., the mix of vicarious and direct liability, whether a direct suit under the Constitution involves different considera-

Facts Pertinent to Issues

Introductory Statement. This cause involved a jury verdict rendered in favor of the respondents, Mr. Starkey and National Permanent. The Petitioner, Mr. Clipper, contends that that verdict is wholly irrelevant to our issues because it arose from pre-trial rulings and denied instructions on the scope of liability for negligence and incorporation of state substantive tort principles that struck from the case those theories of liability under the civil rights statutes and constitution that are at the heart of the issues asserted on this Petition.

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*/ (Cont'd. from previous page) tions of "respondeat superior" than a section 1983 case, etc. The lower court may agree; the discovery record has not been made and hence there is no proper record for these matters before this Court.

The basis of the affirmed decision on the denied instructions and theories appears in the trial rulings below. Although this Court need go no further than the summary of facts set forth in the Court of Appeals ruling, still, to avoid any question that there were facts in the record to support our theory of ordinary "negligence plus" under the civil rights acts, the summary of events by the Trial Court and certain stipulations --- especially important, a stipulation concerning FBI testimony --- deserves special focus.

Let it be clear that respondents produced enough evidence of "good faith" to sustain a jury verdict --- if our theories of negligence or those about the relation of federal remedy to state substantive principles, were not struck from the case when presented as instructions; or if the facts did not require an instructed verdict by way of striking the defense.

This appeal is not merely about denied instructions however. Simply because a trial court has erred in some instructions is hardly a sufficient reason for issuance of a writ. Mere error below is clearly not our reason for urging issuance of the writ. It is the importance of the theories and principles at issue, not the error itself that properly determines how this Petition should be considered and why it should be granted.

Cognizant of that fact, we underscore that our case is about the striking of significant theories regarding liability and constitutionally permissible defenses under the federal civil rights statutes and the Constitution. It is thus not remotely about evidentiary sufficiency. It is about the constitutionally permissible to those who seek to defend against a constitutional deprivation by claiming or asserting "good faith" when they are not ordinary citizens but involved in the investigative process.

It is about what standards exist for those defenses, and whether or to what extent, negligent acts or "negligent plus" acts by those with official duties (e.g. to arrest, detain) or standards for readily accessible but ignored evidence of innocence available before arrest, may cause those "defenses" to be pierced as a matter of law --- by principle or instruction --- on the theories at issue here.

We have underscored this statement of facts with these points, because for the purpose of this Petition we need set forth only those facts that do show how these theories apply and how they arose.

Substantially most of the critical facts and contentions are in the Pre-Trial Order (App. 51-58). Unhappily our appendix is extensive not because we should require it but solely because critical elements are in instructions struck from and not covered by the entire charge. The extended appendix

therefore is designed to show where the issues were raised, how they were resolved, that we are correct in asserting that our theories were not covered by the charge read as a whole. To avoid permitting a forthright response from asserting these record claims, the appendix is there for reference if needed. These facts which we now refer to all appear in the original references set forth below.*/

*/ References to the transcripts that are pertinent to this statement are: Vol. 1, Tr. 1-54; Vol. 2, Tr. 1-10, 20-30, 43-45, 50-54, 65-76, 108-114 (Clipper); Vol. 2A, Tr. 142-152, 164, 165, 168, 170-174, 175, 180-184, 194-197, 203, 209, 211 (Dalrymple); Vol 2A, Tr. 236-237, 238 (Martin); Vol. 3, Tr. 7, 15-16, 21-22, 41-44, 53, 55 (Martin); Vol. 3, Tr. 70-74, 87 (Goodmark); Vol. 3, Tr. 103-108, 117, 118-119, 121, 127 (Mongello); Vol. 3, Tr. 151-158, 162-163 (Mohler); Vol. 4, Tr. 6-9 (Veign); Vol. 4, Tr. 26, 31-33, 54-56, 61-63, 66, 71, 72-74, 94-96 (Mohler); Vol. 5, Tr. 101B-106; 121 (Starkey); 129-130 (Dalrymple); Vol. 5, 131, 137, 152-153, 156-170, 180-185, 187, 190-196, 197 (Starkey); Vol. 6, Tr. 9-13, 17-18, 20-21, 35-37, 39-40, 45-48, 51-56, 91, 97, 100-108, 131-137, 146-149 (Starkey); Vol. 7, Tr. 167-172 (F.B.I. stipulation); Vol. 7, Tr. 176-183 (Starkey deposition testimony); Vol. 7, Motions for Directed Verdict, reserved; Vol. 7, Tr. 197-198, 202-203 (Scott); Vol. 7 232-278 Motions. R. 651, ruling on "false arrest and imprisonment." See also plaintiff's exhibits 1, 2, 3, 4, 5-5B, 7-7A, 12, 13-13B, 14, 15, 19, 20, 26.

First it is undisputed that Mr. Clipper was and is totally innocent of everything with which he was charged in this case. Undisputed facts showed that the arrest of Mr. Clipper was made on May 15, 1971 at the Officers' Mess of the National Naval Medical Center in Bethesda where he held weekend employment; he was regularly a radiologist in the Department of Commerce in Washington and had never been arrested before; it was stated by respondent Starkey or the Montgomery County Police officers who accompanied him that the arrest was a result of Mr. Starkey's obtaining arrest warrants issued by a Prince George's County Justice of the Peace; the arrest on the evening of Saturday, May 15 was in the presence of many others; Mr. Clipper was brought to Bethesda Police Station for processing and then to the Hyattsville Police Station where he remained over the weekend and then transferred to the Upper

Marlboro jail; the charges, he was told, were for assault with intent to kill, kidnapping, armed robbery and bank robbery arising from events taking place at National's bank in Langley Park, Maryland in the early afternoon of May 14, 1971, more than 24 hours before his arrest and confinement; a bond of approximately $125,000 was set; he remained in the jail for approximately a week until released on the reduced bond of approximately $1,000 put up by his family; he was returned to court at least twice and that those charges remained outstanding until they were dismissed by a "nol pros" in July, 1971; it was alleged in the complaint and established at trial that two of the three individuals involved, namely Garlan Lathan and John David Wood were participants in the robbery and were

seized at the scene by the police officer involved, the Takoma Park officer Wortman; there was evidence that Lathan, who was shot at the scene, had met the other two that day; the third member was in fact one Russell Coley who was later apprehended; he escaped, commandeering a car and making its occupants his hostages; it is undisputed, it is stated in the complaint, that Garlan Lathan is the son-in-law of the plaintiff; that he did not implicate Mr. Clipper and that the vehicle used in the robbery, and shot at by the officer, was registered in Mr. Clipper's name because he had given it to his daughter as a wedding gift; it is also undisputed that there was no line-up, that any alleged identification was by photographs, solely or only of Mr. Clipper; and that while there was varying

testimony as to the original descriptions given by the bank employees (they varied from Mr. Clipper's actual age and weight by from 10-12 years in age and 30-40 pounds in weight); there is no dispute that the culprit did not have a mustache, as did Mr. Clipper, and his hair, as reflected in photographs produced from a hand camera, was almost totally grey, unlike Mr. Clipper's at the time. The record noted below also reflected the fact that in the mid or late afternoon of May 14, 1971 the F.B.I. came to his home, where he had been on a day-off from his regular job, and at the time informed him of the fact that an automobile registered or listed in his name was involved in a robbery; that after some calls, he voluntarily went to the Takoma Park police station in the early evening; saw

the heavily damaged car; was interviewed by Mr. Starkey who recently arrived; was looked at by Officer Wortman, the arresting officer, who, he claimed, had said that "he is not the man"; had pictures taken of himself thinking they were for the car; and after describing other incidents surrounding the events, including informing Mr. Starkey of what he had been doing, he left; the officer on the scene (Wortman) also left; Mr. Clipper testified that about the established time of the robbery (about 1:00 p.m.) he was at home either working on a friend's car or in his yard, and as noted, was there when the F.B.I. came a short time thereafter to inform him about the car and its whereabouts; and he produced a number of witnesses who saw him and could have so verified his whereabouts, but who

were never contacted; testimony and exhibits showed that Lathan had told them he had not seen Mr. Clipper and that Mr. Clipper was not involved; as noted; Officer Wortman, who viewed the escaped Coley, either stated Mr. Clipper was not involved or made no identification, putting his department on such notice some 24 hours before Mr. Clipper was arrested. Ultimately there were bank pictures taken during the robbery showing the true culprit (Mr. Coley). It was Mr. Clipper's contention that they were either intentionally or negligently not looked at and that they did show or would have shown that any identification of Mr. Clipper was wrongful. He contended that the bank camera pictures were readily accessible, before arrest, even immediately available, and incon-

trovertible evidence of his innocence (the totally grey hair of the person, lack of mustache and other characteristics clearly not showing that person to be him and/or at least so putting any viewer on such notice).

The evidence reflected only a one-picture show-up of Mr. Clipper to the bank employees on Saturday morning, and no line-up, and no policy of Takoma Park against either deficiency.

It was contended by Mr. Starkey that at least two or three (Mohler, Mongello and McConkey) gave positive identifications of Mr. Clipper; there was evidence at the trial, however, specifically from Martin and Mongello, that that was not so at all. The only "positive" identification, if any, ultimately claimed at the trial was that by the

manager, Mr. Mohler,*/ the remaining employees or witnesses either disavowing that any identification was even given at all or qualifying it to a resemblance.

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*/ While the Court of Appeals noted this fact, the lower Court did underscore that before trial Mr. Mohler admitted by way of an affidavit submitted on the Bank's Motion, that Mr. Clipper only "resembled" the perpetrator. At trial he also stated on cross-examination that that affidavit truthfully stated the extent of what he could say. For our purposes, however, it is unnecessary to argue with the partial extension of the facts or their selection by the Court of Appeals decision. The issue here does not turn on whether there really was a positive identification, but when, what was immediately accessible or available beforehand (primarily the incontrovertible bank camera pictures) and the secondarily unimpeachable witnesses who could prove that Mr. Clipper was home at the time of the robbery and how that --- at best --- single identification from the many was in fact obtained, ie., by a single photograph show-up of Mr. Clipper taken at the police station the day before, when he came to inquire about his car.

No employee looked at the bank camera pictures; nor was there any policy or directive in this regard to do so; nor any attempt at a face-to-face confrontation.

Mr. Clipper claimed that as a result of the evidence all the employees, including Mr. Mohler, showed that they did not know if Mr. Clipper was involved and that they acted with especial negligence in making such "identifications," because, as bank employees, they were aware that their responses would result in the arrest, confinement and other restraints on Mr. Clipper, that they also negligently or recklessly misrepresented their states of mind if they did make positive identifications; and that the bank was separately negligent in failing to supervise or train them

properly in this matter or set forth proper rules or procedures earlier, including requiring them to examine the bank's camera pictures of the event before making an identification. As to Officer Starkey, the evidence was replete with acts of negligence plus, including the failure to interview immediately available witnesses, some of whom testified at trial and were unimpeachable, the failure to review the bank camera materials, the failure to tell the magistrate the full facts, and, indeed, all of the matters set forth in the pretrial order previously noted.

The trial defendants denied that they either willfully or negligently violated the rights of the plaintiff; they denied that he was entitled to recovery against them for the alleged false arrest,

false imprisonment or malicious prosecution, or negligent invasion of his rights or interests. Specifically, they claimed to have produced evidence: 1) that National Permanent's employees did not take any affirmative steps by request, persuasion or otherwise cause the arrest of the Plaintiff; 2) that National Permanent's employees had no knowledge that their identification was wrong, and they reasonably believed in the truthfulness of their identification; 3) that Plaintiff's race was not a motivating factor behind National Permanent's employees' identification and that they did not seek to injure Plaintiff in any way because of his race; and 4) that none of National Permanent's employees entered into any kind of conspiracy to deprive Plaintiff of any rights (App.

101).

At pre-trial, respondent Starkey claimed he would produce evidence to show what his pre-trial position stated; and Mr. Starkey so testified:

> "That Mr. Starkey came on duty after the robbery had taken place and was given a description of the third person wanted; that he was told about the car being registered in the name of the plaintiff; that the plaintiff appeared at police station dressed similar to description given or person wanted even to extent that person wanted had been drinking and plaintiff had been drinking; that defendant Starkey then showed photos to employees of National Federal, when identification was made; defendant Starkey then had an arrest warrant obtained; than [sic] even as late as the first time a hearing was scheduled in the criminal aspect of the case the manager from National Federal still identified plaintiff as the person being sought as the third person involved in the robbery." (C.A.App. 101-102)

In short, respondents did produce evidence that they acted in good faith.

Further, they stressed that not only was there what they claimed were valid arrest warrants obtained by Mr. Starkey, but that the F.B.I. had earlier taken the camera after the robbery.

A stipulation as to the F.B.I., critical to the issues here, showed that it was not in primary control of the case; that it merely acted as a cooperating or accommodating party to Takoma Park, and most important, that the bank photographs had been processed and developed and were available for viewing within a few hours after the incident; and, in fact, apparently before Mr. Starkey interviewed and took pictures of Mr. Clipper when he came to see about the car late Friday afternoon, and some 24 hours before his arrest the following day; and they would have been turned over "immediately" upon

request.*/ We append that critical document (App. 59-61).

Among other testimony was that of Mr. Starkey that he felt he had sufficient evidence to arrest Mr. Clipper on the very evening of the robbery, although he did not do so; that the failure to hold any line-up was in accord with a then-existing Takoma Park practice or procedure, as was the one-man photograhpic show-up (Vol. 5, Tr. 190-197); nonetheless, good faith was asserted; further, all racial motivation was denied; and all the defendants stated that, in effect, they did not act maliciously and were at all times simply doing their jobs or following established procedures (Ibid and Vol. 3, Tr. 55, 103-108, 127, 162).

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*/ The bank camera took pictures about every second during the period of at least 2-3 minutes of the robbery (Vol. 4, pp. 72-74, 94-96).

REASONS FOR ALLOWANCE OF THE WRIT

1. The Ruling Below Has Decided Important Questions of Federal Law Affecting a Large Number of Civil Rights Decisions and Which Should Now be Settled by this Court, Particularly Since they Involve Issues Which Are Unresolved or Reserved in Procunier v. Navarette and Baker v. McCollan

In his recent dissent in Maine v. Thiboutot, ___U.S.___, 100 S.Ct. 2502 (1980), Mr. Justice Powell noted just how extensive in recent years has been the "upheaval" in Section 1983 actions, which he then described as ones which "now contribute a substantial share of the federal caseload." See Maine v. Thiboutot, supra, 100 S.Ct. at 2515-2516 and footnote 15 showing civil rights filings exceeding 13,000 per year in 1977, an increase from a mere 296 in 1961, figures which excluded prisoner's petitions.

Those figures alone tell us how important it is to settle the issue of standards of negligence or "negligence plus" in civil rights causes, unresolved in Procunier v. Navarette, supra and commented upon and left open by the majority opinion in Baker v. McCollan, supra.

Our facts involve the Fourth Amendment violation that Baker did not.

Our instructions categorically and repeatedly raised the issue of negligent wrongs.

The facts to which we devoted so much attention can be seen by any cursory reading of the record (the pre-trial order only is sufficient) to show how our issue was raised and how it was rejected, even in our rehearing request when pursued a final time.

It needs no more from us to say than that the issue must be settled; this is the

cause to settle it in; the facts are very analogous to Baker except that we urged what Baker did not --- an improper arrest; no further underscoring of the record on the bank camera or the one-man showup or the ready availability of alibi witnesses is really necessary as it relates to "negligence plus." We note in passing that Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968) involved a group of different persons.

2. The Ruling Below Decides an Important Question of Federal Law That Should Be Settled By the Court in the Use of Local Law.

As we noted below and indeed the Trial Court's opinion observed, Maryland does not permit those who arrest the innocent any defense, except mitigation (App. 22). The issue is simply whether under Section 1988 a civil rights plaintiff may take the benefits of any state law

without its detriments (noted at App. 23-24) to aid in expanding the federal remedy. It too is a significant point deserving of this Court's consideration.

CONCLUSION

This Petition should be granted.

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1629

George Clipper, Appellant,

-versus-

National Permanent Federal Savings and Loan Association, a National Banking Association, Takoma Park, Maryland, a Municipal Corporation or Entity, and Grant A. Starkey, Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. C. Stanley Blair, District Judge.

Argued: August 19, 1980. Decided: October 10, 1980

Before RUSSELL, WIDENER and PHILLIPS, Circuit Judges.

Edward L. Genn for Appellant; Robert E. Cahill (Maurice A. Montaldi on brief) for Appellee National Permanent Federal Savings and Loan Association; Susan Z. Whitman (Phillips L. Goldsborough, III, Howard G. Goldberg, Smith, Somerville & Case on brief) for Appellee Takoma Park, Maryland; Gilbert Hoffman for Appellee Grant A. Starkey.

PER CURIAM:

This case grew out of a robbery of the Langley Park branch of the defendant National Permanent Federal Savings and Loan Association in Takoma Park, Maryland, (Association) on the afternoon of May 14, 1971, by two armed men. In the course of leaving the branch, one of the robbers was shot and captured by a Takoma Park policeman. The other robber escaped after commandeering a car from its owners. The third participant in the robbery was the driver of the getaway car. He was arrested at the scene of the robbery. The car used by him was impounded by the Takoma Park police authorities. Police officers from Takoma Park and Prince George's County and Special Agents of the Federal Bureau of Investigation arrived at the Association very quickly after the robbery.

Their efforts to secure some information on the other robber were unsuccessful. They did discover, however, that George Clipper, the plaintiff, was the registered owner of the getaway car and the father-in-law of one of the men in custody.

The officers, in their interviews of the employees of the Association inquired of their recollection as to the clothing, mannerisms, and physical characteristics of the escapee. They, also, secured from the Association's branch manager the film of the robbery as recorded on the Association's surveillance camera. This film was developed at the FBI Lab the afternoon of the robbery, and was returned to the local office of the FBI engaged in the investigation.

At this point, it seems the FBI turned over the investigation of the robbery largely to the local police, who had captured two

of the three bank robbers. Detective Corporal Grant A. Starkey, a member of the Takoma Police Department, was assigned the case when he reported at six o'clock Friday afternoon. Some hours after this, George Clipper visited the Takoma Park Police Station to inquire about his automobile. Officer Starkey interviewed Clipper, he believed Clipper to be the escaped robber. He did not, however, arrest him. Clipper did permit Starkey to take his fingerprints and to photograph him. Clipper then left.

Shortly after the branch opened the next day after the robbery, Starkey visited the branch. He showed the manager of the branch the pictures he had taken the night before of Clipper. The manager gave a positive identification. When the pictures were shown to other employees of the Association, they expressed the opinion that they

"believed that was the man" or that there was a resemblance between the two.

Starkey at this point conferred by telephone with a Special Agent of the FBI and appeared before a Prince George's County Justice of the Peace. He testified orally before the Justice of the Peace about the robbery and the reasons for his belief of probable cause to arrest George Clipper for the robbery. Warrants were issued on the basis of Starkey's testimony, charging Clipper with armed robbery, felonious assault and kidnapping. The warrants were served on Clipper the same day and he remained in custody under those warrants until May 21, 1971,

when he was released on bail. The charges against Clipper were dismissed in July, 1971, after the manager of the Association indicated that his identification of Clipper was inaccurate.

The plaintiff Clipper then filed two actions, one against National Permanent Federal Savings and Loan Association, and the other against the municipal corporation Takoma Park, and the police officer Grant A. Starkey.[1] In the suit against the Association he charged false arrest, false imprisonment, and malicious prosecution. He set forth the same charges in his complaint against Takoma Park and Starkey. He based jurisdiction in his action against the Association on diversity as well as under the Civil Rights Statutes §§ 1981, 1983 and 1985, 42 U.S.C. Jurisdiction of the other suit rested on the Civil Rights Statutes and their jurisdictional counterpart, § 1343, 28 U.S.C. After discovery, all parties moved for summary judgment. The motion of Takoma Park

---

[1] Initially, Prince George's County was included as a defendant, but it was dismissed from the case. The appeal does not contest that dismissal.

was sustained on the ground that as a municipal corporation it was immune from liability under Monroe v. Pape, (1961) 365 U.S. 167. The motions of the defendants Association and Starkey were denied and the cases against them proceeded to trial. At trial, the district court granted the Association's motion for a directed verdict on the claims of false arrest and false imprisonment, but, at the conclusion of the evidence, submitted the case against it was well as against the defendant Starkey, on both the malicious prosecution and the civil rights claims, to

the jury. The jury returned a verdict in favor of the Association and Starkey.

The plaintiff has appealed the dismissal of the action against the defendant Takoma Park, and the judgments entered in favor of the defendants Association and Starkey, primarily for errors in instructions.

We have reviewed the record of the trial in the case against the Association and Starkey, and find no reversible error. The judgments in favor of National Permanent Federal Savings and Loan Association and Grant A. Starkey are accordingly affirmed. The dismissal of the action against the defendant Takoma Park must be reversed, however, on the basis of Owen v. City of Independence, (1980) ___ U.S. ___, 43 L.W. 4389 (April 15, 1980), and Monell v. New York City Dept. of Social Services, (1978) 436 U.S. 658, both decided subsequent to the decision of the district court dismissing the action against Takoma Park and the action is remanded to the district court.

AFFIRMED IN PART
and
REVERSED AND REMANDED
IN PART

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1629

FILED
DEC 3 1980
U. S. Court of Appeals
Fourth Circuit

George Clipper,

Appellant,

versus

National Permanent Federal Savings and Loan Association, etc., et al,

Appellees.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell with the concurrence of Judge Widener and Judge Phillips.

For the Court,

App. 9

/s/ William [illegible]

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER	:	
v.	:	CIVIL NO. 73-294-B
NATIONAL PERMANENT FEDERAL SAVINGS AND LOAN ASSOCIATION	:	
GEORGE CLIPPER	:	
v.	:	CIVIL NO. 73-295-B
TAKOMA PARK, MARYLAND and GRANT A. STARKEY		

***

Filed: March 25, 1975.

Blair, District Judge.

MEMORANDUM

Plaintiff, George Clipper, instituted this action for damages against the named defendants, alleging three causes of action in each case for false arrest, false imprisonment, and malicious prosecution. The acts complained of arose out of a robbery

that occurred on May 14, 1971, on the premises of the National Permanent Federal Savings and Loan Association (National), the defendant in Civil No. 73-294-B, located in Takoma Park, Maryland. The complaints allege the following facts:

C.A.App. 51

Three men participated in the robbery, two of whom were immediately apprehended when they attempted to escape from the scene in a getaway car. The third man commandeered another private vehicle and was able to escape. One of the two apprehended men was plaintiff's son-in-law. The vehicle in which the two attempted escape was registered in the name of the plaintiff, who had given the car to his daughter as a wedding gift.

Later that day, the Federal Bureau of Investigation learned that the vehicle was registered in plaintiff's name and questioned

him at his home. Plaintiff told the FBI agents of the circumstances surrounding the car's ownership and that he had not seen his son-in-law for several months. The FBI then informed him that his vehicle was impounded at the Takoma Park police station. Later that evening, plaintiff went to the station and was informed that one Corporal Starkey was handling the investigation.

Starkey and other officers then began to interrogate him, but another officer states that plaintiff did not fit the description of the third man involved in the robbery, and that he "was not the man." The next day, while at work, plaintiff was arrested, and later booked and fingerprinted by the Montgomery County Police at the Bethesda station. He was then taken by Corporal Starkey back to the Takoma Park station where he was again interrogated.

C.A.App. 52

Eventually he was taken to a cell in the Hyattsville police station, where he remained until Monday, May 17, 1971. On that date he was formally charged in open court with kidnapping, armed robbery, and assault with intent to murder. Bond was set at $125,000. Plaintiff remained in jail until Friday, May 21, when the bond was reduced to $10,000. Upon meeting this sum by payment of bond costs, plaintiff was released. In July of 1971, the charges against plaintiff were dismissed. The robber who escaped was subsequently apprehended and charged with the crime.

As to National, the plaintiff alleges that it knew he was falsely arrested and it failed to take reasonable action to correct the falsity of the arrest. He further alleges that National used an automatic "panning" camera designed to take pictures

during robberies, and that National's employees made false identifications of plaintiff as the robber before checking the photographs taken on the day of the robbery. Finally, plaintiff alleges that these acts were in furtherance of a conspiracy with Corporal Starkey to falsely arrest and imprison plaintiff, and that National maliciously instituted and continued the prosecution of the criminal proceedings against him.

C.A.App. 53

National is the only defendant in Civil No. 73-294-B. Plaintiff alleges diversity jurisdiction under 28 U.S.C. § 1332 (1970). Plaintiff's claims are also based on 42 U.S.C. § 1981, 1983, and 1985 (1970), jurisdiction resting on 28 U.S.C. § 1331, 1343 (1970). At oral argument on the pending motions, counsel for plaintiff dropped his contentions based

on 42 U.S.C. § 1983, but now presses his claims under 42 U.S.C. §§ 1981 and 1985, as well as under state common law causes of action in diversity.

The defendants in Civil No. 73-295-B are Prince George's County, the City of Takoma Park, and Grant A. Starkey, the arresting officer who is a member of the Takoma Park police force. Defendant Prince George's County was dismissed from the action by stipulation. Jurisdiction over the claims against Starkey and Takoma Park is based on 28 U.S.C. §§ 1331, 1332, and 1343, the plaintiff grounding his action on common law false arrest, imprisonment, and malicious prosecution, as well as on 42 U.S.C. §§ 1981, 1983, and 1985.

Defendant National has filed a motion for judgment on the pleadings. Defendant Takoma Park has filed a motion to dismiss

on the grounds that, as a municipality, it is not subject to suit under 42 U.S.C. § 1983, and that it enjoys sovereign immunity and has not consented to this action. Oral argument was heard on November 29, 1973. Subsequently, the parties and the court agreed that decision on the motion be held in abeyance pending further discovery. Discovery having been completed and, in accordance with Fed.R.Civ.P. 12(b)(c), matters outside the pleadings having been presented to the court in the form of affidavits, depositions, and interrogatories, the motions will be treated as motions for summary judgment to be decided in accordance with Fed.R.Civ.P. 56. Further relevant facts developed from these additional matters will be set forth below.

C.A.App. 54

I. Takoma Park's Motion to Dismiss

Plaintiff has asserted several bases for claims against Takoma Park for his alleged wrongful arrest. First, plaintiff asserts that Takoma Park is liable under Maryland common law principles of false arrest, false imprisonment and malicious prosecution. Jurisdiction for this action is allegedly based on diversity of citizenship, since plaintiff is a citizen of the District of Columbia and Takoma Park is a citizen of Maryland for diversity purposes. Second, plaintiff alleges claims against Takoma Park under the Civil Rights Acts --Sections 1981 (equal rights under the law), 1983 (deprivation of rights under color of state law), and 1985 (conspiracy to interfere with civil rights) of Title 42 of the United States Code. Jurisdiction for these actions is based on 28 U.S.C. §§ 1331, 1343 (1970).

C.A.App. 54

Finally, plaintiff asserts a claim against Takoma Park based directly on violations of the Fourth and Fourteenth Amendments to the United States Constitution. In support of this claim, plaintiff argues that Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388 (1971), which recognized a damage remedy for violations of the Fourth Amendment by federal agents, should be applied by analogy to allow a constitutional cause of action in tort for damages against state municipalities for like violations by its police officers and for the failure of the officers' supervisors to prevent such acts. The court will now proceed to discuss Takoma Park's motion to dismiss with respect to each claim asserted by plaintiff.

*** (Discussion re Takoma Park Motion omitted)

***

(C.A.App. 80)

II. National's Motion for Summary Judgment

While plaintiff has dropped his claims against defendant National Permanent Federal Savings and Loan Association based on 42 U.S.C. §1983, he still presses his claims for relief under Sections 1981 and 1985 of 42 U.S.C. Jurisdiction for these claims properly rests on 28 U.S.C. § 1343 (1970). Plaintiff also asserts claims under Maryland common law for false arrest, false imprisonment, and malicious prosecution, jurisdiction resting on diversity of citizenship under 28 U.S.C. §§ 1332 (1970).

A. Claims Under 42 U.S.C. §§ 1981, 1985

In Part I-B of this Memorandum, this court held that plaintiff had failed to establish a claim against Takoma Park under section 1981 because recovery was depen-

dent upon a showing that plaintiff was deprived of a right enumerated in the section which under similar circumstances would have been accorded a person of a different race. Since plaintiff did not allege, nor does discovery disclose, that the alleged wrongful acts were committed on account of his race, Takoma Park was entitled to summary judgment. See page 11 supra. Since the pleadings and discovery (C.A.App. 81) are identical in both cases, the same reasoning applies to the section 1981 claim against National. Hence, National's motion for summary judgment in its favor on the section 1981 claim will be granted.

Similarly, in Part I-D of this Memorandum, this court held that plaintiff had failed to establish a claim against Takoma Park under 42 U.S.C. § 1985, because that section requires allegations

and proof of a conspiracy to deprive a person of constitutional rights with a racial or otherwise class-based discriminatory motivation. Since there were no allegations of, nor has discovery disclosed, proof of such a motivation, summary judgment was granted in favor of Takoma Park. Again, the same reasoning applies to National, and its motion for summary judgment in its favor on the secion 1985 will therefore be granted.

***

(C.A.App. 81)

B. Common Law Claims in Diversity

1. False Arrest and False Imprisonment

Under Maryland law, false arrest and false imprisonment are actually the same tort at common law, differing only in terminology. Great Atl. & Pac. Tea Co. v. Paul, 256 Md. 643, 261 A.2d 731 (1970). There are three elements for the tort of false arrest or false imprisonment:

(1) The defendant must deprive the plaintiff of his liberty; (2) the deprivation must be without the plaintiff's consent; and (3) the deprivation must be without legal authority. Id.

(C.A.App. 82)

As to the second element, plaintiff did not consent to his own arrest so far as anything before the court reveals. As to

the third element, it is not satisfied if the arrest was made pursuant to valid legal process. Brewer v. Mele, 267 Md. 437, 298 A.2d 157, 159 (1972). If the defendant has complied with the formal requirements of the law, and a valid warrant is issued, he cannot be liable for false imprisonment even if he swears out a warrant without probable cause. W. Prosser, Handbook on the Law of Torts, § 12, at 49, and § 119, at 835 (4th ed. 1971) [hereinafter cited as Prosser]. In the latter situation, plaintiff's remedy is only for malicious prosecution. Id; see Brewer v. Mele, supra. In this case, there is substantial evidence that a warrant was issued, but this court cannot say that there is no disputed issue as to the legal validity of the form of the arrest warrant. Hence, this court will assume for discussion pur-

poses that the arrest was without legal justification.

The remaining question, then, is whether there is any disputed issue of material fact as to the first element of the false imprisonment claim --- that defendant deprived plaintiff of his liberty. Here, plaintiff was arrested by Montgomery County police officers. Officer Starkey was present at the time, but did not directly participate in the actual arrest. Further, (C.A.App. 83) none of National's employees participated in the arrest, nor were any present at the time. Nevertheless, it is settled in Maryland that the defendant in an action for false arrest or imprisonment need not be the actual person who made the arrest or participated in the detention. It is sufficient that the defendant initiated or induced another, such

as a police officer, to make the arrest. See Mahan v. Adam, 144 Md. 355, 124 A. 901 (1924). However, the rule in the vast majority of American jurisdictions is that if, at the request of the police, one merely gives information to the police tending to show that plaintiff committed a crime or merely falsely identifies the plaintiff as the perpetrator, he is not liable for false arrest or imprisonment, absent evidence of affirmative persuasion or voluntary participation in the act of arrest or detention. See, e.g., Bass v. Dunbar House, Inc., 161 A.2d 50 (D.C.Mun.App. 1960); Burke v. New York, N.H. H. R. R. Co., 267 F.2d 894, 899 (2d Cir. 1959) (applying Connecticut law); Restatement (Second) of Torts § 45A, comment c (1965); Prosser, supra at 47. Apparently, no reported Maryland cases have expressly

ruled on whether the mere giving of false information will render a person liable for a subsequent unlawful arrest. Nevertheless, in the absence of a controlling decision of the highest state court, a federal court sitting in diversity has a duty

> to find the law of the state as best [it] can from other sources, and [it has] the right to assume, nothing else appearing, that [the state] has not lagged behind other states in the development of its common law concepts and that the (C.A.App. 84) law prevailing within its jurisdiction is not contrary to the great weight of modern authority.

Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.), cert. denied, 342 U.S. 887 (1951). This court believes that Maryland courts would follow the majority of states as to the rule governing the required involvement of a private person in the false arrest of another by a police officer. See Angelozzi v. Cossentino, 160 Md. 678, 155 A.

178 (1931). Hence, in order for plaintiff in this case to recover on the basis of false arrest or false imprisonment, he must allege and prove that National's employees took some active part in bringing about an unlawful arrest, by some affirmative direction, persuasion, request, or voluntary participation. Prosser, supra at 47. Plaintiff cannot recover if National's employees merely gave information to legal authorities, who were left free to use their own judgment, or merely identified the plaintiff as the person wanted. Id. The mere giving of information or identification without further affirmative participation in the unlawful arrest will render the defendant liable for the resulting false imprisonment only if he actually knew that the information or identification was false. Prosser, supra at 47

n. 97.

Certain facts are undisputed. During the robbery on May 14, 1971, National's automatic panning camera was activated and it took several photographs of the actual robber. On the same day, agents of the Federal Bureau of Investigation took possession of the undeveloped film and brought it to the F.B.I. laboratories for processing. The developed photographs were not returned to National until well over a year later. (C.A.App. 85) On the day after the robbery, certain of National's employees were presented with one or more photographs by Officer Starkey, all or some of which were pictures of the plaintiff. The employees each made varying identifications of the plaintiff as the robber. Officer Starkey stated in his report that at least one identification was positive. The

testimony of the employees reveals that none of the identifications were definite. The affidavit of Vincent Mohler, National's branch manager, states that all of the employees agreed that the pictures of the plaintiff "resembled" the robber. On May 21, 1971, the day that the bail was reduced to $10,000, Mohler made a positive face-to-face identification of plaintiff as the robber. This identification was made outside the courtroom at the request of Starkey and plaintiff's attorneys. After further examination, Mohler retracted his identification and stated that plaintiff was not the man.

It is also clear that National's employees had not looked at the automatic camera photographs before the photo show-up with Officer Starkey, nor had they been instructed to do so by their superiors. It is further undisputed that to the extent identifications were made by the employees, they were wrong.

Counsel for plaintiff, in opposition to the motion for summary judgment, has submitted an extensive memorandum summarizing further facts that a jury could find based on the evidence now before this count. For example, a jury could find that National's (C.A.App. 86) employees were not properly trained to deal with robberies and subsequent identification; that National had failed to establish reasonable procedures to deal with such occurrences; that the employees were at least negligent in their identifications; and that National failed to take reasonable actions subsequent to the identification to correct the falsity of the imprisonment. This court agrees that a jury might so find. But throughout the factual summary plaintiff does not contend that the employees did anything more than make erroneous identifications and provide other information concerning the robbery to law enforcement officials. There is no contention, and the affidavits and deposi-

tions negate the fact, that any of National's employees took any active part in plaintiff's arrest. There was no affirmative direction, no persuasion, and not even a request to any law enforcement official to arrest the plaintiff. Hence, defendant cannot be liable unless the employees actually knew that the identifications they made were false.

In his complaint, plaintiff alleged that National's employees knew that the identifications were false at the time they were made. At most, the discovery shows that the employees were negligent. Plaintiff's discovery has disclosed no direct or even circumstantial evidence that tends to show that National's employees knew plaintiff was not the man at the time of the identifications. If this were

all the evidence introduced at trial, this court would have no hesitation to direct a verdict in favor of the defendant on the false imprisonment claim, there being no affirmative evidence of actual knowledge on the part of National's employees. (C.A.App. 87)

Nevertheless, even though there is considerable doubt as to the plaintiff's ability to prove actual knowledge at trial, this court is hesitant to grant summary judgment when the resolution of this issue is dependent solely upon the state of mind of defendant's employees. As Judge Wisdom of the Fifth Circuit has stated in an analogous situation:

> Knowledge on the part of the company can be proved only by showing the state of mind of its employees. The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind. Much depends on the credibility of the witnesses testifying as

> as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.

Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir. 1970). Moreover, the attitude of the Fourth Circuit is clear on the granting of summary judgment in situations where the plaintiff's ability to survive a directed verdict is in doubt:

> It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented.

(C.A.App. 88)
Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.), cert. denied, 342 U.S. 887

(1951).

Because the resolution of the false imprisonment claim turns largely on the credibility of National's employees, this court is unwilling to grant summary judgment for defendant. Of course, if the plaintiff is unable at trial to introduce affirmative evidence of the employee's actual knowledge that one or more of the identifications were false, either through the employees' own testimony or other credible evidence, the court might well grant a motion for a directed verdict in favor of a defendant on the false imprisonment claim. Accordingly, National's motion for summary judgment in its favor on the false imprisonment claim will be denied.

The foregoing discussion, however, does not foreclose the possibility that, even in the absence of evidence that Na-

tional's employees had actual knowledge of the falsity of their identifications, plaintiff may recover against National under general principles of actionable negligence for an actual invasion of a legally protected interest in bodily security. Restatement (Second) of Torts § 35, comment h, at 53-54 (1965); Prosser, supra at 48. This court merely holds that as a matter of law plaintiff cannot recover against National under the facts in this case for the intentional tort of false arrest or false imprisonment under Maryland common law, absent a showing that National's employees had actual knowledge of the falsity of their identifications.

2. Malicious Prosecution

Under Maryland law, the elements of a case for malicious prosecution are well

established:

> There must be: (a) a criminal proceeding instituted or continued by the defendant against the plaintiff, (b) termination of the proceeding in favor of the accused, (c) absence of probable cause for the proceeding, and (d) malice, or a primary purpose of instituting the proceeding other than that of bringing an offender to justice.

Brewer v. Mele, 267 Md. 437, 298 A.2d 156, 159 (1972); Safeway Stores v. Barrack, 210 Md. 168, 122 A.2d 457, 460 (1956).

It is undisputed here that the criminal proceeding was terminated in favor of the plaintiff. The facts surrounding the issue of probable cause, however, are in dispute. Plaintiff contends that Officer Starkey had no positive identification and in fact was informed by another police officer who was at the scene of the robbery, that plaintiff was not the man. Plaintiff points to the differences in appearance

between the plaintiff and the actual description of the robber given by the eyewitnesses, as well as to other facts concerning plaintiff's background and his activities on the day of the robbery, as all negating the existence of probable cause to justify Starkey in swearing out a warrant.

(C.A.App. 90)

As to the actions of National's employees in identifying the photographs of plaintiff as at least resembling the robber, it is certainly not clear from the evidence before this court that as a matter of law the employees had reasonable grounds or probable cause to do so. It is not at all clear what photographs were shown to the employees by Officer Starkey, and, even if it were, those photographs are not now before the court for it to make a judgment as to the reasonable grounds or

lack thereof for the identifications.

It should also be noted that the magistrate's commitment of the accused, as occurred in this case, is evidence that the initiator of the proceedings had probable cause. Restatement of Torts, § 663(2) (1938). In determining what weight should be given to the magistrate's action, the court should consider evidence that the commitment was procured by false testimony offered by the person initiating the proceedings or given in his behalf. Id. comment h. Whether the evidence given before the magistrate was false in this case is certainly in dispute. Since these disputed facts are material to the issue of probable cause, and since plaintiff is entitled to all favorable inferences that can be drawn from the evidence, it would be inappropriate for the court to grant

summary judgment for defendant on the basis of lack of probable cause.

Plaintiff is also required to show malice on the part of defendant. However, (C.A.App. 91) under Maryland law, malice may be inferred from lack of probable cause, although want of probable cause cannot be inferred from any degree of malice. Safeway Stores v. Barrack, 210 Md. 168, 122 A.2d 457, 461 (1956). This presumption of malice may be rebutted by the circumstances under which the defendant acted. Id. Since the existence of probable cause is in dispute, this court cannot say, as a matter of law, that National's employees acted without malice.

The question then remains whether the criminal proceeding against plaintiff was instituted or continued by National. If such an action was instituted by an employ-

ee, then the employer will be liable therefor if the employee was acting in the regular course and within the scope of employment with National that could constitute an initiation or continuation of the prosecution against plaintiff.

It is not a prerequisite to liability under the tort of malicious prosecution that the defendant must actually swear out a warrant for the plaintiff's arrest. Safeway Stores v. Barrack, supra, 122 A.2d at 400. It is sufficient that the defendant instigate or aid and assist in the criminal prosecution. Id. But the mere appearance of defendant as a witness in the crim-

inal prosecution pursuant to legal summons does not amount to aiding or assisting so as to render him liable. Mertens v. Mueller, 119 Md. 525, 87 A. 501, 505 (1913); Prosser, supra, at 836. Further,

> [i]f the defendant merely states what he believes, leaving the decision to prosecute entirely to the uncontrolled discretion of the officer, or if the officer makes an independent investigation, . . . [the defendant] is not regarded as having instigated the proceeding. . . .

Prosser, supra at 837; accord, Campbell v. Yellow Cab Co., 137 F.2d 918 (3d Cir. 1943) (applying Pennsylvania law). As was stated above in the context of the false imprisonment claim, there appears to be no contention that National's employees did anything more than provide information and identifications to the law enforcement officials when requested to do so, leaving to the discretion of those officials whether to prosecute. Prosser, supra at 837.

Again, however, the evidence before the court tending to show lack of such knowledge is largely dependent upon the credibility of National's employees.

Hence, for the reasons stated above with reference to the false imprisonment claim, National is not entitled to summary judgment.

(C.A.App. 91B)

III.

Accordingly, the defendant Takoma Park is entitled to summary judgment in its favor as to all claims asserted by plaintiff and National is entitled to summary judgment on the claims plaintiff asserts under 42 U.S.C. §§ 1981, 1983, 1985 (1970) and under the Fourth and Fourteenth Amendments. The motion of National as to all other claims asserted by plaintiff under the common law of Maryland is hereby DENIED. Judgment shall be entered separately.

C. Stanley Blair
United States District Judge

Date: March 25, 1975

(C.A.App. 92)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER	:	
v.	:	CIVIL NO. 73-294-B
NATIONAL PERMANENT FEDERAL SAVINGS AND LOAN ASSOCIATION	:	
: : : : : : : : : : : :	:	: : : : : : : : : : :
GEORGE CLIPPER	:	
v.	:	CIVIL NO. 73-295-B
TAKOMA PARK, MARYLAND and GRANT A. STARKEY	:	

JUDGMENT

For the reasons stated in an Opinion of even date, summary judgment is hereby entered in favor of Takoma Park, Maryland as to all claims made by the plaintiff, and summary judgment is hereby entered in favor of National Permanent Federal Savings and Loan Association as to claims asserted by plaintiff under 42 U.S.C. §§ 1981, 1983,

1985 (1970) and under the Fourth and Fourteenth Amendments.

C. Stanley Blair
United States District Judge

Date: March 25, 1975

R. 165
R. 416

(C.A.App. 93)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER	:	
v.	:	CIVIL NO. 73-294-B
NATIONAL PERMANENT FEDERAL SAVINGS AND LOAN ASSOCIATION	:	
: : :

1983, 1985 (1970) and under the Fourth and Fourteenth Amendments. Plaintiff has now filed motions for reconsideration in both cases. Upon initial consideration of the motions, the court regarded only one contention of plaintiff as having possible merit: that it was improper under the circumstances for the court to conclude as a matter of law that no discrimination had been alleged or shown with respect to the plaintiff's claims under 42 U.S.C. §§ 1981 and 1985. (C.A.App. 94) Accordingly the court by letter requested defendants to respond to this contention. The court also requested Takoma Park to address the issue of whether it is subject to suit under section 1981. The hearing today has been restricted to these issues.

As the plaintiff correctly observes, neither defendant raised the question of

the sufficiency of the plaintiff's factual allegations and discovery materials to support a claim against defendants under sections 1981 and 1985. Quite obviously, the court was of the contrary view when the original opinion was filed. While a court may, in appropriate circumstances, grant summary judgment even though the legal principles relied on by the court may be different from those advance by the parties, Broderick Wood Prods. Co. v. United States, 195 F.2d 433, 436 (10th Cir. 1952), the court should be cautious in doing so, especially where there is a possibility that the opposing party could have demonstrated that a genuine issue of material fact existed had the issue been specifically raised by the moving party. 10 C. Wright & A. Miller, Federal Practice and Procedure § 2725, at 519 (1973).

Since plaintiff in these cases had received no notice that the court might grant summary judgment on grounds different from those advanced by defendants, this court believes that it erred in entering judgment in favor of defendants on the claims asserted under 42 U.S.C. §§ 1981, 1985 (1970) without affording plaintiff an opportunity to respond to those points. Accordingly, the judgments so entered will be vacated.

(C.A.App. 95)

The court is now presented with an issue that was raised by defendant Takoma Park in its motion, but which the court did not reach in its prior ruling: whether or not Takoma Park is subject to suit for damages under 42 U.S.C. § 1981. This court holds that it is not. Bennett v. Gravelle, 323 F. Supp. 203 (D.Md.), aff'd., 451 F.2d 1011 (4th Cir. 1971), cert. denied, 407

U.S. 917 (1972); Mack v. Lewis, 298 F. Supp. 1351 (S.D.Ga. 1969); Boyden v. Troken, 358 F. Supp. 906 (N.D.Ill. 1973); See Arunga v. Weldon, 469 F.2d 675 (9th Cir. 1972); Flood v. Margis, 461 F.2d 253 (7th Cir. 1972). Contra, Maybanks v. Ingraham, 378 F. Supp. 913 (E.D.Pa. 1974). Further, as stated in this court's previous opinion, Takoma Park is also not subject to suit for damages under 42 U.S.C. §§ 1983, 1985 (1970). Clipper v. National Permanent Federal Savings and Loan Ass'n, Civil No. 73-294-B (D.Md., Mar. 25, 1975) memorandum opinion at 12-14 and cases cited therein). Accordingly, Takoma Park's original motion to dismiss will be granted.

For the above-stated reasons, it is this 17 day of July 1975, by the United States District Court for the District of Maryland, ORDERED:

1. That the judgments entered by this court in favor of defendants on March 25, 1975 in Civil Action Nos. 73-294-B (C.A.App. 96) and 73-295-B be, and the same hereby are, vacated with respect to all claims for relief under 42 U.S.C. §§ 1981, 1985 (1970).

2. That the motion of defendant Takoma Park to dismiss in Civil Action No. 73-295-B be, and the same hereby is, GRANTED.

/s/

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

(C.A.App. 97; R. 571)

GEORGE CLIPPER :

v. :

NATIONAL PERMANENT FEDERAL SAVINGS AND LOAN ASSOCIATION : CIVIL NO. 73-294-B

Filed Jan 1, 1976

GEORGE CLIPPER :

v. : CIVIL NO. 73-295-B (Consolidated)

TAKOMA PARK, MD., and GRANT A. STARKEY :

PRE-TRIAL ORDER

1. The plaintiff's statement of facts and contentions with respect to all defendants are as follows: The plaintiff, George Clipper, brings these actions, now consolidated, for compensatory and punitive damages against the defendants based on federal jurisdiction and diversity jurisdiction and under the Constitution of the United States and pursuant to Title 42 U.S.C. Section 1981 through 1988 and Title 28 U.S.C. Sections 1331, 1332, and 1343, and as to the defendant bank, which is a federally chartered institution, pursuant to applicable federal laws pertaining to it. The suit for

such damages is based on alleged willful, negligent and unconstitutional wrongs violating Mr. Clipper's constitutional rights and injuring, invading or impairing his right and interest in being free from restraint and bodily interference. Mr. Clipper claims that he was wrongfully arrested, imprisoned and confined by the defendants or at their instigation and as a result of their conspiracy; and that they acted without probable cause and in bad faith and with malice and out of racial motivation; and that they failed to correct the wrongs when able to do so; and each acted for the other. As a result Mr. Clipper asserts that their actions constitute violations of his constitutional rights, the Civil Rights Acts and constitute the common law torts of false arrest, false imprisonment and malicious prosecution. Further and without regard to the intentional wrongs he has alleged and asserts negligent wrongs in this regard resulting in his wrongful arrest and confinement and wrongful charges and prosecution, and the negligent failure to prevent or end the same.

C.A.App. 98 R. 571

The claims of the plaintiff in this regard are against each of the defendants, National Permanent Federal Savings and Loan Association, the bank involved, and

Grant A. Starkey, the police officer involved. (Former defendant Prince George's County was dismissed by stipulation upon specific representations of its non-involvement; and the court granted a summary judgement to defendant Takoma Park, Maryland.)

The facts which support these contentions show this: that an arrest of Mr. Clipper was made on May 15, 1971 at the Officers' Mess of the National Naval Medical Center in Bethesda where he held weekend employment; that the arrest was made pursuant to arrest warrants obtained by the defendant Starkey upon his oath; that the defendant Starkey accompanied by Montgomery County Police officers effected the arrest in the evening of Saturday, May 15 at that employment; that Mr. Clipper was brought to the Bethesda Police Station for processing to the Hyattsville Police Station where he remained over the weekend and transferred to the Upper Marlboro jail; that the charges were for assault with intent to kill, kidnapping, armed robbery and bank robbery arising from events taking place at defendant's bank in Langley Park, Maryland on May 14, 1971 the day before his arrest and confinement; that a bond was set of approximately $125,000; that he remained in the jail for

C.A.App. 99

approximately a week until released on the reduced bond of approximately $10,000 put up by his family; that he was returned to court at least twice and that those charges remained outstanding until they were dismissed by a "nol pros" in July 1975; further, that Mr. Clipper did not commit any of the offenses criminally charged nor did he participate in, or was involved in them. It was alleged in the complaint and is undisputed here that two of the individuals involved, namely Garlan Lathan and John David Wood were participants in the robbery and were seized at the scene by the police involved, and particularly Officer Henry Wortman, the arresting officer; and that the third member, first claimed to be Mr. Clipper was, in fact, one Russell Coley who was later apprehended. It is undisputed and stated in the complaint that Garlan Lathan is the son-in-law of the plaintiff and the vehicle used in the robbery was registered in Mr. Clipper's name.

It is the contention of the plaintiff, however, that other circumstances surrounding that registration and as set forth in the complaint and in his testimony show that this did not make out "probable cause" for his

arrest, and in any event the defendants acted negligently in restraining or causing the restraining of his liberty. In this regard plaintiff asserts that it appears that the defendants were told where Mr. Clipper was at the time of the events and made no effort to verify his contentions; C.A.App. 100 that Lathan had told them he had not seen Mr. Clipper and that Mr. Clipper was not involved; that Officer Wortman who was the arresting officer told them Mr. Clipper was not involved and put them on such notice some 24 hours before Mr. Clipper was arrested; that there were pictures showing the true culprit (Mr. Coley) which either were intentionally or negligently not looked at and would have shown that any identification of Mr. Clipper was wrongful; that the defendants concealed or failed to notify others of the efficacy of the bank camera and pictures; that the defendants (or the authorized employees of the bank and defendant Starkey) actually knew their alleged "identifications" of Mr. Clipper both before and after the arrest, confinement and bringing of and continuing of the charges; or they acted with negligence in making such "identifications" knowing that they would result in the arrest, confinement

further states as follows: (1) that National Permanent's employees did not take any affirmative steps by request, persuasion or otherwise to cause the arrest of the Plaintiff; (2) that National Permanent's employees had no knowledge that their identification was wrong, and they reasonably believed in the truthfulness of their identification; (3) that Plaintiff's race was not a motivating factor behind National Permanent's employees' identification, and they did not seek to injure Plaintiff in any way because of his race; and (4) that none of National Permanent's employees entered into any kind of conspiracy to deprive Plaintiff of any rights he had.

The defendant Starkey specifically further asserts as follows:

> "Defendant Starkey came on duty after the robbery had taken place, was given a description of the third person wanted, was told about the car being registered in the name of the plaintiff; that plaintiff appeared at police station dressed similar to description given of person wanted even to extent that person wanted had been drinking; defendant then showed photos to employees of National Federal, identification was made, defendant then had an arrest warrant obtained and did not arrest plaintiff but officers of Montgomery County arrested plaintiff. That even as late as the first time a hearing was scheduled in the criminal aspect of the case the manager from National Federal still identified plaintiff as the person being sought as the third person involved in the robbery."
>
> C.A.App. 102

3. There are no cross-claims, counterclaims or third party claims.

4. Plaintiff requests amendments by interlineation of the ad damnum clauses of the Complaint to provide that the damages are "not less than those noted in such clauses....

5. No issue heretofore raised is abandoned.

6. No stipulations agreed to.

C.A.App. 103

7. The specific damages claimed by Mr. Clipper include the following, largely detailed in Depositions or Answers to Starkey Interrogatories:

(a) $1240-$1275 (approximate) in direct wage loss at Systematics Laboratory and about $200-250 at Officers' mess.

(b) $2500 incurred for attorney fees to defend original charges;

(c) $800 in reasonable bond and $175 in miscellaneous expense;

(d) Loss of wage-earning capacity;

(e) Injuries, fears, apprehensions, and thus damage consisting of matters detailed in Complaint, Plaintiff's deposition and answers to Starkey Interrogatories;

(f) General damage related to reputation, anxiety and the general damage matters stated in detail in pleading and discovery.

(g) Permanency is asserted.

8. Documents: Those marked at depositions and held by all defendants' counsel including Prince George's County and Takoma Park, and those attached here. Arrest warrant (to be supplied by defendants) and photographs defendant claims were shown to employees of National Permanent. All documents as marked.

9. Dr. R. Stephen Hulbert, plaintiff's physician, 3000 Dent Place, N.W., Washington, D.C., may be called as an expert.... C.A.App. 104

10. Other.

/s/

JUDGE, UNITED STATES
DISTRICT COURT

/s/

EDWARD L. GENN
Attorney for Plaintiff

/s/

GILBERT A. HOFFMAN
Attorney for Defendant Starkey

/s/

ROBERT E. CAHILL
Attorney for Defendant National Permanent

This extract is from FBI Stipulation, C.A.App. 115-119., R. 586.

STIPULATION

"It is hereby stipulated and agreed to by all of the parties to this action and by the United States of America, attorneys for the Federal Bureau of Investigation and John Mulholland, that if called to testify under oath in these proceedings, John Mulholland would testify that:

"1. I am a Special Agent of the Federal Bureau of Investigation and have been so employed for 24½ years;

"2. In May of 1971, I was stationed at Hyattsville, Maryland resident agency office;

"3. On May 14, 1971, I was notified that the Langley Park Branch of the National Permanent Federal Savings & Loan had been robbed at approximately 1:20 p.m. by three men, two of whom had been arrested by Takoma Park Police Department at the scene. The third escaped.

"4. I proceeded to the bank, arriving at approximately 3:00 p.m. Upon arriving I was designated Case-Agent in charge of the FBI's investigation. At that time Takoma Park Police Department was processing the bank, that is, examining and collecting physical evidence, taking fingerprints, and

interviewing witnesses. Although federal jurisdiction was available, inasmuch as Takoma Park Police Department had arrested two of the three robbers, the investigation of the third robber was left in their hands. However since there was possible interstate travel involved, the Bureau assisted in the investigation. (emphasis added)

"5. At approximately 2:40 p.m., prior to my arrival, bank manager Vincent T. Mohler unloaded a roll of film from the bank surveillance camera, which had taken pictures during the robbery, and furnished the undeveloped roll to FBI Special Agent Felice M. Muollo of the Silver Spring Resident Agency, for transportation to the FBI photo lab for processing;

"6. The film was given to Agent Muollo at the request of Takoma Park Police Department. Upon request of local law enforcement agencies the Bureau will often provide technical assistance and make its laboratory personnel available to process and analyze physical evidence submitted to the FBI laboratory. In this case the FBI developed the bank film as a routine accommodation to Takoma Park Police Department and as part of the Bureau's own investigation. (emphasis added)

"7. The film was transported by Special Agent Muollo to the FBI laboratory at 9th and Pennsylvania Avenues, N.W., Washington, D.C. where at 3:16 p.m., it was turned over to photographic unit employee Merton S. Compton, Room 7314 for processing.

"8. As part of routine procedures, the photo lab developed the entire roll and blew up selected prints for distribution to law enforcement agencies involved in the investigation. These prints were given to Agent Muollo along with the developed roll of film at 3:40 p.m. for return to the Silver Spring Resident Agency...."(C.A.App. 117)

After other explanations about what happened over the weekend and thereafter, this critical statement appears:

"16. At no time between the date of the robbery and the date I returned the prints did Takoma Park Police Department request the film and prints developed at the FBI lab. Had such a request been made, as Case Agent in charge I would have been notified and would have turned the prints over to Takoma Park Police Department immediately." (emphasis added)(C.A.App. 118)

The following is from the filed written charge reflecting the ruling on "false arrest" and "false imprisonment" (R. 651 and C.A.App. 162A-B)

"In this case, Mr. Clipper has sued Sergeant Starkey and National Permanent Federal Savings and Loan, which I will refer to as National Permanent, for malicious prosecution under Maryland law, and Sergeant Starkey, only, for deprivation of Mr. Clipper's constitutional and civil rights under federal law, and Sergeant Starkey and National Permanent both for conspiracy to deprive Mr. Clipper of equal treatment under federal law. Thus, there are three possible theories of recovery for the damage Mr. Clipper claims he suffered and I will instruct you on the separate elements of each theory. You may recall that some mention was made at the beginning of the case that Mr. Clipper

had brought suit against both Sergeant Starkey and National Permanent for what was described as false arrest and false imprisonment. I have concluded, as a matter of law, that Mr. Clipper may not recover on this theory against either of the parties - defendant. The fact that I have so concluded in this respect does not in any way indicate whether Mr. Clipper is or is not entitled to recover from the parties-defendant on any of the remaining three claims which I mentioned above. It means merely that I am submitting those three claims to the jury for its determination.

C.A.App. 162B R. 651

Malicious Prosecution

Plaintiff has sued both defendants alleging that he was damaged by malicious prosecution caused by them. In order for you to find for Mr. Clipper on this theory, ..."

NOTE: THE REMAINING WRITTEN CHARGE GIVEN COUNSEL APPEARS AT R652 ET SEQ IN THE RECORD. IT VARIES IN SOME RESPECTS FROM THE ACTUAL CHARGE GIVEN THE JURY THAT FOLLOWS. THE FOREGOING DOES, HOWEVER, REFLECT THE FORMAL RULING ON THE FALSE ARREST AND FALSE IMPRISONMENT CLAIMS, AND THOSE THEORIES OF LIABILITY OR THOSE RELATED THERETO.

The following is the actual oral charge. It begins at the Court of Appeals Appendix 163 (C.A.App. 163).

ORAL CHARGE OF THE COURT

(C.A.App. 163)

THE COURT: I will instruct you now on the law that will govern you in deciding this case. It is your duty as members of the Jury to decide the facts and in deciding the facts in this case, to comply with the rules of law as I give them to you without regard to what you thought or think the law is or ought to be, in the event that you thought it was something other than as I do it. In deciding the facts and issues, you must decide them without prejudice, without bias, without sympathy.

In this case, we have two individuals and one corporation. I will tell you that the National Permanent is entitled to exactly the same treatment as any individual in this case.

In my instructions to you, if I seem to state any portion of them in varying ways or through different ideas, no emphasis is intended by me on one portion

of the instructions to the exclusion of another. Stated otherwise, you are not to single out any one part of my instructions and exclude consideration of the evidence under another part of my instructions. C.A.App. 164 You are, in fact, to consider the evidence in light of all the instructions that I give you. Now, you have heard the evidence in the case, and you will not hear it again. There are some matters which will go to the Jury room with you; and, of course, you may make such use of those as you choose at the time. The instructions that I give you, therefore, you are hearing and should listen to carefully because they will guide you in determining what facts you find from the evidence in this case.

Now, I am a judge, of course, and in one sense, you are judges ... in this case, you are judges of fact. If any expression of mine, in the course of this trial, has indicated to you, or seemed to indicate to you, that I hold any particular belief as to what the outcome of this case should be, or as to whether a certain fact exists or does not exist, or certain testimony is entitled to credit over other testimony, I instruct you

expressly at this time to disregard that because I have had no such intention; and, indeed, since you are the finders of fact and I am not, it would make no difference since that is exclusively your province and not mine. You are to consider all of the evidence in this case, just as though you are to consider all of the instructions that I give you. And that means that you are not to limit yourself to the evidence that any counsel in the case refers to. But, you are to consider all evidence and all exhibits, all testimony ... whether that was referred to by counsel or not. C.A.App. 165

Now, this is a civil case, and the burden is on the Plaintiff in a civil case, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the Plaintiff's claim by a preponderance of the evidence, the Jury should find for the Defendants ... or a particular Defendant, if the evidence failed with respect to one Defendant and not, perhaps, with respect to another one. To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words,

the preponderance of the evidence in the case means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your mind the belief that what is sought to be proved is more likely true than not true. In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, you may, unless I otherwise instruct you, consider all witnesses, all evidence, regardless of which side may have produced that evidence and called that witness.

There are, generally speaking, two types of evidence from which a Jury may find truth as the facts that are important to be found in a case. One we call direct evidence, such as the testimony of a person who has witnessed an event. And the other is indirect or circumstantial evidence, which means the proof of a chain of circumstances pointing to the existence or non-existence of a fact. As a general rule, the law makes no distinction between direct and circumstantial evidence, but it simply requires that the Jury find the facts in accordance with the preponderance of all the evidence in this case, be it direct, or be it

C.A.App. 166

circumstantial.

You, on the other hand, are to consider only the evidence presented and you may not guess or speculate as to the existence of facts in the case. In your consideration of the evidence, however, you are not limited to the literal words, for example, that a witness may use ... what we might call the bald assertion of a witness. On the contrary, you are permitted to draw from facts which you find have been proved such reasonable inferences as seem justified to you in light of your own experience. Inferences, as I use it here, mean deductions or conclusions which reason and common sense lead you, as members of the Jury, to draw from fact which has been established to your satisfaction in the evidence, by a preponderance of the evidence.

I remind you that the statements and arguments of counsel are not evidence and should not be considered as evidence unless any such statement was made as a stipulation, conceding the existence of the fact or the existence of certain testimony. When the attorneys on both sides agree as to such a matter, which we call a stipulation, the Jury may accept the stipulation, or

C.A.App. 167

the matter contained in that agreement, as evidence and regard that as something properly before you for whatever weight you think the matter deserves. There were or are stipulations in this case. There is one concerning the amount of attorney fees that Mr. Clipper has paid. There is another concerning what Agent Mulholland, F.B.I. Agent Mulholland's testimony would have been had he been in Court to testify.

Gentlemen, have I omitted any or does that cover it? Mr. Genn.

Mr. GENN: That's it.

THE COURT: I think it was too, if I recall correctly. If you recall others that were formerly agreed to by counsel and presented to you in Court, it is your right to consider them.

Now, at times throughout the trial, the Court has been called upon to pass on the admissibility of certain evidence that was offered by one party or another. That was done by objection of counsel. You should not be concerned with the Court's rulings or the reasons for them, other than you should abide by the ruling. Whether evidence which has been offered by a party in

the case is admissible or not admissible, and if admissible, whether admitted for a limited purpose or for your consideration, generally, is purely a question of law for the Court to decide. When I admit evidence to which an objection has been made, I am not
C.A.App. 168
determining what weight you, as members of the Jury, should give to that evidence. That is your role. On the other hand, if I have sustained an objection, you are not to guess what the answer might have been to any question to which there was an objection; and you are not to speculate as to the reason the question was asked or the reason that one or the other of the counsel may have raised the objection. It is their right and their duty to call upon the Court for a ruling by raising an objection, and they have exercised that right in this trial.

Now, it follows that you are the sole judges of the credibility of the witnesses and what weight, if any, the witnesses' testimony deserve. A witness generally, it is said, is presumed at the outset to speak the truth; but, this presumption may be outweighed by the manner in which the witness testifies, by the

character of the testimony given ... or even by contradictory evidence which you think is more credible. You should carefully scrutinize the testimony given; the circumstances under which a witness has testified; and every matter in evidence which tends to indicate to you whether that witness is worthy of belief, and if so, to what extent. Consider, among other things, the witness' apparent intelligence; any motive that you might detect and state of mind of the witness; the demeanor of the witness while testifying; the relationship that a witness while testifying; the relationship that a witness may bear to either side of the case; C.A.App. 169 the manner in which the witness might be affected by your verdict; and the extent to which, if at all, the witness or the testimony given by the witness is either supported or contradicted by other credible testimony that is in the case.

Now, naturally, there will be inconsistencies and discrepancies in the testimony of the witnesses; and indeed, perhaps, in the testimony of a single witness. Two or more persons who witness an event may, indeed, recall it differently. An innocent misrecollection,

like failure or recollection, is surely not an uncommon human experience. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may be a reason for you to consider what weight should be given to that testimony and whether the discrepancy or inconsistency relates to a matter of importance, or an unimportant detail, and whether it results from willful falsehood or innocent mistake, or error.

We say that a witness may be discredited and impeached ... we use it synonymously ... not only by contradictory evidence, but also by evidence that at other times the witness has made statements which are inconsistent with the present testimony of that witness, and those statements are presented in the course of the evidence presented at the trial. You should, therefore, consider in weighing the testimony of the witness, whether the witness has made statements at other times which are inconsistent with present testimony; and whether such inconsistency, as I said before, appears to be the result of innocent error or willful falsehood; and whether it relates to matters of importance in the case

C.A.App. 170

or unimportant matters. Now, the earlier contradictory statements of a witness are admissible to impeach or discredit the testimony of the witness in Court ... but, not to establish the truth of the earlier statements. However, an earlier out-of-Court statement, presented in evidence in the course of the trial, and made by a party to the suit, may be considered for its truth just as the statement that the party may make in Court. Now, after you have considered all of the factors bearing upon the credibility of the witness, those which I have perceived, and those which your common sense would suggest to you, you could, of course, conclude to reject all of the testimony of a witness; accept all of the testimony of a witness; or indeed accept it in part and reject it in part. In other words, the bottom line is that you may give the testimony of that witness just such weight and credibility as you feel the testimony deserves.

You are not bound, in this or any other case, to decide issues of fact in accordance with the testimony of any particular number of witnesses which does not produce in your mind belief in the likelihood of truth;

as, for example, against the testimony of a lesser number of witnesses or other evidence which does produce such
C.A.App. 171
a belief in your mind. The test is not which side produces the greater number of witnesses of the greater quantity of evidence; indeed, it is which side presents the most credible evidence on the points at issue.

During the trial, there have been instances where certain testimony was read to you by way of deposition of various witnesses that have been taken at other times before this case came on for trial. You may consider the testimony of a party that was given in deposition, just the same as the testimony the party gave in the Court. And you may consider the depositions that were read here as they were taken from witnesses for the purpose of determining the credibility of the various witnesses, other than the parties or not limited to the parties.

Now, I will at this point, turn to the specific case that we have. And this part is particularly important, as all of it is, indeed, because what I will be giving you for the next thirty minutes, perhaps, or more, is that which will guide you on the particular claims that are at issue between the parties. I told

you at the time counsel started to argue, that Mr. Clipper had sued Sergeant Starkey and National Permanent Savings and Loan, which I will hereafter refer to as National Permanent; and he has done that on several theories. I have, as a matter of law, which is the Judge's role, decided that the case should be submitted to you on three of these theories. These are claims against National Permanent and Sergeant Starkey, first, for malicious prosecution under Maryland law; and secondly, a claim against Sergeant Starkey, only, for deprivation of Mr. Clipper's constitutional and civil rights under Federal Law; and thirdly, a claim against Sergeant Starkey and National Permanent, both, for conspiracy to deprive Mr. Clipper of equal treatment under Federal law. Thus, there are three possible theories of recovery for the damage Mr. Clipper claims he suffered; and I will instruct you on the separate elements of each theory. Let me tell you at the outset that even though Mr. Clipper seeks to recover on various theories, he is entitled to recover, if at all, only once in compensatory damages for any injuries that he has suffered; plus, he is entitled to recover, if you

C.A.App. 172

so see fit and assess compensatory damages, any punitive damages which you think, against either or both Defendants, are merited from the evidence you have heard.

Now, Plaintiff has sued, speaking to malicious prosecution, both Defendants, alleging that he was damaged by malicious prosecution to them. And, let me say here that prosecution in this case does not necessarily mean, or is it limited to, going completely through a trial. The commencement of a criminal proceeding, as I use it here, is prosecution. In order for you to find for Mr. Clipper on this theory, you must be satisfied that he has proven by a preponderance of the evidence the following essential elements. First, the commencement or continuation of judicial proceedings by the Defendants against him. Second, the termination of such proceedings in favor of Mr. Clipper. Thirdly, absence of probable cause for the proceedings; and fourthly, malice on the part of those instituting the proceedings. Mr. Clipper claims that he was maliciously prosecuted by both Sergeant Starkey and National Permanent. You must consider the

C.A.App. 173

evidence against each Defendant separately. You may find for Mr. Clipper against Sergeant Starkey or against National Permanent, or against both of them, or against neither of them. In order to recover against either Defendant, Mr. Clipper has the burden of proving by a preponderance of the evidence as to that Defendant each of the four essential elements I have stated above.

I will instruct you first with respect to Sergeant Starkey and then with respect to National Permanent. The evidence in the case is that Sergeant Starkey arrested Mr. Clipper and caused him to be prosecuted for bank robbery, kidnapping and assault with intent to murder; and that the case against Mr. Clipper terminated in his favor in a Court in Prince George's County. Thus, the first two of four elements in the suit against Sergeant Starkey for malicious prosecution are established and you may accept those two elements as proven.

C.A.App. 174

I will now turn my attention to the third and fourth elements of the offense of malicious prosecution.

The third element is probable cause for making the arrest. In this case, Sergeant Starkey obtained a warrant for the arrest of Mr. Clipper. In order to obtain such a warrant, a police officer must have sufficient and reliable information which would lead a reasonable and cautious man to conclude that the accused person whose arrest is sought is the person who is guilty of the offense.

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By its very name, probable cause does not mean that the belief that the suspect is guilty is beyond any doubt; it is consistent with some measure of doubt and even with the ultimate innocence of the person accused. This is so because the decision to arrest is a decision to initiate criminal proceedings in a Court of law. The final decision as to guilt or innocence is left to the Jury of twelve persons. At the same time, the decision to arrest a man and to accuse him of a major felony is a serious decision of the utmost importance. Accordingly, we require that probable cause be an objective standard based upon facts and reasonable inferences to be drawn from those facts. Thus, the mere belief of the person who makes the arrest, however sincere, does not establish that probable cause existed.

In this case, it is for you, the
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Jury, to decide whether there was probable cause for the arrest of George Clipper on the evening of May 15, 1971, for a bank robbery that took place on the preceding day. In making that determination, you should consider all of the facts and circumstances which were known to Sergeant Starkey at that time, including both the facts which tended to show that Mr. Clipper was the man who robbed the bank and those which tended to show that he was not the man.

While weighing these facts and circumstances in your mind, you should consider whether the information received by Sergeant Starkey was reliable and trustworthy; or, in other words, was obtained in a manner which induced accuracy. You should also consider whether there were

sufficient facts and circumstances pointing to Mr. Clipper's innocence prior to the evening of May 15th, which would have led a reasonable man to conduct a further investigation before making the decision to arrest. Finally, you should consider the need, if any, for prompt action in making the arrest. If you find that the facts and circumstances pointing to innocence were sufficiently strong that Sergeant Starkey should have made a further investigation, then he did not have probable cause. At the same time, you should remember that probable cause is not the same as conclusive proof of guilt.

If you find that Sergeant Starkey did not have probable cause to arrest Mr. Clipper, then you must also decide whether he acted with malice, which is the fourth essential element of a suit

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for malicious prosecution. Malice is a wrongful motive or evil purpose prompting an act. It may be established by proof of any motive in commencing a criminal prosecution other than that of bringing a guilty person to justice, such as a desire for personal gain, racial bias, or personal animosity. Malice may be inferred from a lack of probable cause. However, an inference of malice which you may draw if you find an absence of probable cause, may be rebutted by the circumstances shown by the evidence under which the Defendant acted. A sincere belief by the Defendant, in this case Mr. Starkey, of the Plaintiff's guilt of the crime charged is a circumstance tending to show lack of malice. Finally, malice may also be inferred from the activity and zeal displayed by the person making the arrest.

If you do not find that that Plaintiff has proved all four essential elements, two of which are undisputed, then he was not maliciously prosecuted by the Defendant, and your verdict must be for the Defendant. If you do find that the Plaintiff has proved he was maliciously prosecuted, then you are to assess damages in favor of the Plaintiff against Sergeant Starkey.

If you find that Mr. Clipper was not maliciously prosecuted by Sergeant Starkey at the time of the arrest, then you must also decide whether Sergeant Starkey caused an unnecessary continuation of the criminal charge against Mr. Clipper. In particular, Mr. Clipper states or claims that Sergeant Starkey was aware or should have been aware of exculpatory information and withheld this information from the prosecutor, in this case the State's Attorney for Prince George's County; and, that the withholding

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of this exculpatory information led to an unnecessary prolongation of Mr. Clipper's detention and prosecution. By exculpatory information, I mean facts which would demonstrate or tend to demonstrate the innocence of an accused person or at least show that there was no probable cause to continue the prosecution against him. It may also consist of facts which would tend to show, but do not prove the innocence of the accused, and which would lead a reasonable person to conduct a further investigation into the case. You should bear in mind that a police officer does not have the duty to search out all of the facts which may in some way indicate the innocence of the accused. Rather, he has such a duty only if he is aware of facts which would prompt a reasonable person to conduct a further investigation. In deciding this

aspect of Mr. Clipper's malicious prosecution claim, the continuation of the claim, you should consider three factors.

1) Did the Defendant withhold exculpatory information or was he aware of facts which tended to be exculpatory and failed to investigate those facts?

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If you find that the information withheld, if any, was not exculpatory, or would not have led upon reasonable investigation to exculpatory information, then this element of the case has not been proven by a preponderance of the evidence.

2) Did the Defendant do so, knowing or having reasonable grounds, to believe that the withheld information, if any, was, in fact, exculpatory?

In other words, if he did not know at the time that the information he had was exculpatory, or did not have reasonable grounds to believe at that time that it

was exculpatory, then the Defendant cannot be liable for withholding exculpatory information.

3) Did Sergeant Starkey withhold the exculpatory information, if any, having reasonable grounds to believe that the withholding of such information would prolong the detention or prosecution of Mr. Clipper?

If you find that the information, if any, would not have resulted in a discontinuation of Mr. Clipper's confinement or the discontinuation of prosecution, then this element of the case has not been proven by a preponderance of the evidence.

So, there are three elements under this aspect of the case; of continuation, if any, of malicious prosecution: First, that the Defendant withheld exculpatory

information; Second, that he knew it was exculpatory at the time he withheld it,

or had reasonable grounds to believe it was exculpatory; Thirdly, that he had reasonable grounds to believe at that time, that the withholding of this information would prolong the detention or prosecution of Mr. Clipper.

If you find that these three elements have been proven by Mr. Clipper, then you must consider whether Sergeant Starkey's withholding of exculpatory information, if any, was prompted by malice. I have defined malice for you, and I will not repeat that definition because the same definition applies here.

In addition to Sergeant Starkey, Mr. Clipper also claims that he was maliciously prosecuted by National Permanent. Now, as you know, the actual arrest of Mr. Clipper was effected by Sergeant Starkey. Notwithstanding this fact, if you

find that there was an absence of probable cause for Mr. Clipper's arrest and if you find that one or more employees of National Permanent either actively participated in the decision to make the arrest or gave knowingly false information to Sergeant Starkey which materially contributed to his decision to make an arrest, and that the employees of National Permanent, if they did so, did so with malice, then National Permanent may be liable for malicious prosecution.

A Defendant in a lawsuit for malicious prosecution need not be the actual person who made the arrest or signed the formal complaint. It is sufficient that the Defendant, in this case National Permanent acting through one or more of its employees, wrongfully initiated, instigated or assisted in the criminal prosecution, if you so find. You should

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remember that every citizen has a duty to inform the police or other legal authorities of what he knows about a crime and to cooperate in its investigation. Consequently, the mere giving of inaccurate information in the honest belief that it is accurate or the mere appearance of a person who gives erroneous information as a witness in a criminal prosecution or investigation, does not make him, or in this case, National Permanent, liable for malicious prosecution. If you find that the employees of National Permanent merely stated what they believed to be the truth, leaving the decision to prosecute entirely to the discretion of the police, or if the police initiated the prosecution solely as a result of an independent investigation, then National Permanent did not initiate, instigate or

assist in the prosecution in such a way as to be liable to Mr. Clipper.

Even if the employees did not initiate or instigate the prosecution, then National Permanent may, nevertheless, be liable for malicious prosecution if one or more of its employees gave knowingly false statements and these statements were a determining factor in influencing the authorities to prosecute. But, if you find that the information given by the employees, even though incorrect, was given in the honest belief that it was true and accurate, then National Permanent is not liable for malicious prosecution.

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If you find that National Permanent, acting through one or more of its employees, initiated or instigated the prosecution against Mr. Clipper, or gave knowingly false information to the authorities, then you must consider whether this action was

taken with malice. Thus, if you find that National Permanent did not initiate the prosecution or did not knowingly give false information to the authorities, or it you find it did either or these two things, but it did not act with malice, then you must return a verdict for National Permanent and against Mr. Clipper. If you find that National Permanent did initiate the prosecution or did give knowingly false information, and did either of those things with malice, then you should return a verdict for Mr. Clipper against National Permanent. Again, I have defined malice; I will not repeat it because the same definition applies as I use the word throughout.

If you find that National Permanent did not initiate or instigate the prosecution, or if you find that they did not give knowingly false information prior to

Mr. Clipper's arrest, then you may also consider whether one or more of its employees gave knowingly false information at a later time, which information materially contributed to a continuation of the prosecution; and if you so find, and you also find that this was done with malice, then National Permanent is liable to Mr. Clipper for malicious prosecution.

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Now, I am turning to the second claim that Mr. Clipper is placing before you as a second theory of recovery. And that is, Mr. Clipper states or claims that his right to be free from restraint without due process of law, which he shares with all Americans under the United States Constitution, was violated when Sergeant Starkey arrested him on May 15, 1971.

This claim is based upon Federal law, and although you will soon see that many of its elements are similar to those of Mr. Clipper's claims for malicious prosecution under the law of Maryland, which I have just concluded instructing you about, you will also find that some of the elements are different. In addition, only Sergeant Starkey is a Defendant under this claim...National Permanent is not a Defendant under the second claim. Consequently, you should keep these claims separate in your mind when deciding the facts of this lawsuit.

Section 1983 of Title 42 of the United States Code provides in pertinent part, that any inhabitant of this Federal District, which is the State of Maryland, may seek redress in this Court by way of damages against any person or persons

who, under color of any law of the State of Maryland, knowingly subjects such inhabitant to the deprivation of any rights, privileges or immunities secured or protected by the Constitution for the laws of the United States.

The Statute which I just stated and outlined to you, is one of our Civil Rights Acts enacted by the Congress under the Fourteenth Amendment to the United States Constitution. It has been on the books a long time, having been passed in 1871.

The Fourteenth Amendment to the Constitution provides in part, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor, shall any State deprive any person of life, liberty or property without due

process of law; nor deny any person within its jurisdiction the equal protection of the law.

One aspect of the liberty of which a person cannot be deprived without due process of law is his right to be free of restraint by police officers without an adequate legal justification. This liberty is guaranteed by the Fourth Amendment to the Constitution, a part of our Bill of Rights, and it states, in pertinent part, that, "The right of the people to be secure in their person... against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause..."

An arrest is a "seizure" within the meaning of the Fourth Amendment, as I just read it to you, and the right not

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to be arrested without due process of law

is one of the privileges and immunities which is guaranteed to citizens under the Fourteenth Amendment. But, as the term "due process of law" implies, the liberty of the individual, which the Federal Constitution secures and protects, is not an absolute or an unqualified freedom or privilege to do as one pleases at all times, under all circumstances. Rather, it is always subject to reasonable restraints which are imposed by law. One of these restraints is that a police officer may make an arrest of an individual if that arrest is supported by probable cause to believe that the individual has committed a crime.

In this case, Mr. Clipper claims that Sergeant Starkey while acting under Maryland law, arrested him without probable cause, and for this reason his rights under the Fourth and Fourteenth Amendments

were violated. I instruct you, as a matter of law, that the actions of Sergeant Starkey were taken, to use the words of the Statute I read you, under color of State law, which is to say, under Maryland law. Mr. Clipper must show by a preponderance of the evidence that the arrest by Sergeant Starkey was not supported by probable cause.

Thus, Mr. Clipper must prove by a preponderance of the evidence that Sergeant Starkey did not have probable cause to arrest him on the evening of May 15th, for the bank robbery. The factors which you should consider in deciding whether there was probable cause are the same as those which I told you about during my discussion of Mr. Clipper's malicious prosecution claim...and I will not repeat them here because they apply equally as well.

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If you find that the arrest was not supported by probable cause, then Mr. Clipper's case is complete. However, Sergeant Starkey, without conceding that he lacked probable cause to make the arrest, contends, as he has a right to do, that even if probable cause was lacking, he acted in good faith and in the reasonable belief that the actions he took were lawful. This is an affirmative defense and the burden is on Sergeant Starkey to prove that defense by a preponderance of the evidence. If you find from all of the facts of this case that Sergeant Starkey did not have probable cause for the arrest, but nevertheless acted in good faith and with the reasonable belief that his actions were lawful, then you must return a verdict in favor of Sergeant Starkey and against Mr. Clipper on this claim. Conversely, if

you find that Sergeant Starkey had neither probable cause nor a reasonable good faith belief that he had probable cause when he arrested Mr. Clipper, then you must find for Mr. Clipper on his claim.

Probable cause is an objective standard. Reasonable people may consider the same facts and in deciding whether probable cause exists, come to different conclusions. Accordingly, the law allows the police officer, in this case Sergeant Starkey, to try to show that notwithstanding any mistake he may have made as to whether probable cause existed, he acted in good faith and with the reasonable belief that he had probable cause to make the arrest, and if he shows good faith and reasonable believe by a preponderance of the evidence, he is not liable to Mr. Clipper.

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Good faith and reasonable belief divide into two elements. First, Sergeant Starkey must show that at the time he made the arrest, he himself believed that he had probable cause to make the arrest of Mr. Clipper, regardless of whether his belief was correct or well-founded. But, here again, the Defendant's personal belief, however sincere, is not enough. So, you must also decide whether Sergeant Starkey's belief was a reasonable one. Thus, if you find that there was not sufficient information to provide probable cause for Mr. Clipper's arrest, you must also decide whether there was sufficient information pointing to Mr. Clipper's guilt to make Sergeant Starkey believe that he had probable cause, a reasonable one. If you find that this belief was in good faith and reasonable, then you would find for Sergeant Starkey.

If you find that Sergeant Starkey was not liable for the initial arrest, then you should consider whether at a later point in time, he withheld exculpa-
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tory information which prolonged the detention and prosecution of Mr. Clipper. If he did have such exculpatory information and withheld it, Mr. Clipper may recover. If he did not have such information or if he did have such information, but did not disclose it in a good faith and reasonable belief, then it was not exculpatory. Then, he is not liable to Mr. Clipper.

I now turn to the third claim, which is a Civil Rights' claim based on conspiracy. As a third claim for relief, Mr. Clipper contends that Sergeant Starkey and National Permanent, acting through its employees, conspired to deprive him of equal treatment under the law or to

deprive him of his constitutional rights. This claim is based on Section 1985(3) of Title 42 of the United States Code, and in pertinent part that section says: "If two or more persons in any State conspire for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges, and immunity under the laws, and if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another in injured in this person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

To succeed on this claim, Mr. Clipper must prove all four of the following essential elements:

First, that Sergeant Starkey and one or more of the employees of National Permanent entered into a conspiracy.

Secondly, that the object of this conspiracy was to deprive Mr. Clipper of his right to equal treatment under the law; or the right not to be arrested, confined or prosecuted without probable cause.

Thirdly, that following the conspiracy agreement, one or more of the co-conspirators committed an overt act, at least one overt act, in furtherance of the conspiracy.

And fourthly, and last, that as a result of this overt act, Mr. Clipper received unequal treatment or was denied the benefit of his right not to be arrested,

confined or prosecuted without probable cause.

Now, what is a conspiracy. A conspiracy is a combination of two or more persons to accomplish some unlawful purpose by concerted action. So, therefore, a conspiracy is a kind of "partnership in unlawful purposes," in which each member becomes the agent of every other member. The gist of the claim is a combination or agreement to damage the Plaintiff by unlawful means. Mere similarity of conduct among various persons, and the fact that they may have been associated with each other, and may have assembled together, and may have discussed common aims and interests, does not necessarily establish a conspiracy.

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However, the evidence in the case need not show that the members entered into any express or formal agreement, or that

they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan, which in this case, as I have told you, would be to deprive Mr. Clipper of equal treatment under the law, or to deprive him of his right not to be arrested, confined or prosecuted without probable cause.

Now, a person cannot conspire with himself, and therefore before you can find that a conspiracy existed, if any did, you must find that Sergeant Starkey and one or

more employees of National Permanent were members of a conspiracy. One may become a member of a conspiracy without full knowledge of all the details of the conspiracy, but happens to act in some way which furthers some unlawful object or purpose of another person, does not thereby become a conspirator.

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Before you may find that a conspiracy existed in this case, you must find that Sergeant Starkey and one or more employees of National Permanent were members of the conspiracy, and that they knowingly formed a conspiracy and wilfully participated in it with the intent to advance or further some object or purpose of that conspiracy.

Now, to act or participate wilfully means to act or participate voluntarily and intentionally. So, if a person with understanding of the character of a plan,

knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant and thereby becomes a conspirator.

In this regard, the conspirators need not have known that the object of their plan was unlawful, but they must have intended to deprive Mr. Clipper of his right to equal treatment under the law, or not to be arrested, confined or prosecuted without probable cause.

With respect to the third element of the claim, an "overt act," what is it ...is any act knowingly committed by one of the conspirators in an effort to accomplish or effect some object or purpose of the conspiracy. The overt act, itself, need not be unlawful in nature, if considered separately and apart from the conspiracy. It must, however, be an act which

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follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of an object or purpose of the conspiracy.

Finally, Mr. Clipper must show that if a conspiracy existed, and if an overt act was committed in furtherance of the conspiracy, that he was injured in his person or property, that is, suffered some harm or damage, or was deprived of having and exercising a right or privilege of a citizen of the United States, in this case, of course the right not to be arrested, confined or prosecuted without probable cause.

Now, throughout the instructions, I have stated that the conspirators, if any, must have intended to deprive Mr. Clipper of equal treatment under the law, or to deprive him of his rights and privileges as a citizen of the United States.

By denial of equal treatment, I mean that the conspirators must have intended to invidiously discriminate against Mr. Clipper because of the fact that he is black. In other words, the conspirators must have intended to treat Mr. Clipper more harshly or in a less than fair manner than they would have a white person under the same situation. If you find that there was a conspiracy and that the conspirators intended to, and did, treat Mr. Clipper unequally because of his race and that he suffered as a consequence of this racially motivated, unfair treatment, then you should find for Mr. Clipper.

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Secondly, you may find for Mr. Clipper, regardless of racial motivation, if the conspirators intended to deprive him of a right or privilege of a citizen of the United States. In other words,

if the conspirators intended to cause Mr. Clipper to be arrested, confined and prosecuted without probable cause, and one or more of the conspirators committed an overt act in furtherance of the conspiracy with the result that Mr. Clipper was arrested, confined and prosecuted without probable cause, then you should also find for Mr. Clipper.

One of the Defendants in this case is National Permanent, as I said. Since National Permanent is a corporation, it is liable for the acts of its employees which were done in furtherance of the business of National Permanent and during the course of their employment. I instruct you as a matter of law that at all times relevant in this case, the employees were acting in the course of their employment. Consequently, if you find that one or more of the employees invaded the rights

of Mr. Clipper, those actions were the acts of National Permanent.

The arrest in this case, the arrest of Mr. Clipper was made pursuant to a warrant that was issued by a Justice of the Peace, who is a judicial officer, or was at the time. In issuing the warrant, the Justice of the Peace made a determination that there was probable cause for the arrest, and this is a factor which you may consider in deciding the issue of probable cause, good faith and reasonable belief, and malice. The fact that a warrant was issued is not binding upon you, however. In evaluating the weight of the warrant as evidence, you should consider the information which was given to the Justice of the Peace by the law enforcement officer; in this case, Mr. Starkey, who sought the warrant and, of course, the truth and reliability of that information.

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Now, if you find that Mr. Clipper was maliciously prosecuted or was deprived of his constitutional right or rights under the laws of the United States, in the manner which he claims, then you should go on to consider in what amount, if any, you should assess damages against one or more of the Defendants. Mr. Clipper seeks both compensatory damages and punitive damages. Compensatory damages are to compensate for injuries, losses, and expenses, proximately caused by the Defendant's conduct, including not only injuries directly and immediately caused by his acts, but also for such consequential injuries as according to common experience of persons are likely to result from such act.

I have just used the term "proximately caused." An injury or damage is proximately caused by an act or a failure

to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct or a reasonably probable consequence of the act or failure to act. This does not mean that the law recognizes only one proximate cause of an injury or damage consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to cause injury or damage. And in such case, each may be a proximate cause.

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If you find that the Plaintiff is entitled to recover on any theory in this case, then in arriving at the amount of damage you should include these things:

First, the reasonable value, not exceeding the actual cost of the medical care which was shown by the evidence to have been paid or incurred by Mr. Clipper, and the evidence is undisputed in that respect in that the medical bill was $7.00.

Secondly, the reasonable value, not exceeding the cost to the Plaintiff, of the legal expense that he incurred because of his arrest, confinement and prosecution; and the evidence, at least by stipulation, which I will now add to those stipulations you had, is that Mr. Clipper paid $1100 for legal fees.

Thirdly, the reasonable value of the time shown by the evidence in the case to have been lost from work as a result of arrest, confinement and prosecution. In determining this amount, if any, you should consider any evidence of the Plaintiff's earnings.

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If you find that the Plaintiff is entitled to a verdict, you should award him a sum which will compensate him also for any pain, suffering, mental anguish, past, present or future, humiliation, embarrassment and the arrest record that was presented, which you find from the evidence he has suffered and is reasonably certain to suffer in the future.

Compensatory damages must be reasonable, if you should find that the Plaintiff is entitled to a verdict, you may award him only such damages as will reasonably compensate him for such injury and damage as you find, from a preponderance of the evidence in the case, that he has sustained as a proximate results of the occurence.

You are not permitted to award speculative damages, so you are not to include

in any verdict compensation for any prospective loss, which, although possible, is not reasonably certain to occur in the future.

You are not to award damages for any injury or condition from which the Plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that the injury or condition was proximately caused by the arrest, confinement and prosecution in this case.

In addition to actual damages, what
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I call compensatory damages, the law permits the Jury, under certain circumstances, to award the injured person what we call punitive damages, in order to punish a wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the Jury should find from a preponderance of the evidence in this case that the Plaintiff is entitled to a verdict for actual or compensatory damages, I use them synonymously; and should further find that the act or omission of the Defendant or Defendants, which proximately caused actual injury or damage to the Plaintiff was maliciously or wantonly or oppressively done; then the Jury may, if in the exercise of discretion, you choose so to do, add to the award of actual damages such amount as the Jury shall agree to be proper as punitive damages.

An act or a failure to act is "maliciously done" is prompted or accompanied by ill will, or spite, or grudge, either toward Mr. Clipper individually, or toward all persons in one or more groups or categories of which Mr. Clipper is a member.

An act or a failure to act is "wantonly done" if done in reckless or callous disregard of or indifference to the rights of Mr. Clipper.

An act or a failure to act is "oppressively done" if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity as by misuse or abuse of authority or power.

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Whether or not to make any award of punitive damages, in addition to compensatory damages, is a matter exclusively within the province of the Jury, if the Jury should find, from a preponderance of the evidence in the case that the Defendants, either or both, acts or omissions which proximately caused damage to Mr. Clipper, were maliciously or wantonly or oppressively done; but, the Jury should always

bear in mind that such extraordinary damages, punitive damages, may be allowed only if the Jury should first award the Plaintiff a verdict for compensatory damages; and the Jury should also bear in mind, not only the conditions under which, and the purposes for which the law permits an award of punitive damages to be made, but also the requirement of the law that the amount of any such damages, if awarded, must be fixed with calm discretion, sound reason, and must never be either awarded or fixed in an amount, because of sympathy or bias or prejudice with respect to a party in this case.

In the opening statements of counsel, or one at least, speaking now from the beginning of the trial --

MR. GENN: May we approach the Bench at this moment.

THE COURT: On this?

MR. GENN: Yes.

THE COURT: You told me before...I
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think that we've reflected that on the record, haven't we?

MR. GENN: That's all right.

THE COURT: Going back to the beginning of the trial -- all right, I won't go back to the beginning of the trial, I'll just leave that right out.

Now, ladies and gentlemen, I am very close to conclusion...in fact, much ahead of what I anticipated. And, in concluding, let me remind you that your verdict must be unanimous on all the questions you're asked to pass upon. As members of the Jury, you are asked to approach the issues in this case as men and women of affairs, discretion, and in the manner in which you would approach any important matter that affected your own lives and was very important to you. You are to consider the

case, obviously, in the Jury room only and only when all jurors are present for deliberation. You are to use, of course, that common sense that's been referred to throughout the trial, and the same way that you would employ it in your own life on important considerations. It is your duty as jurors to consult with one another; that's what deliberation means. And to do that with a view to reaching agreement on a verdict, if you can do that without violence to your individual judgment. Each of you, in effect, must decide the case for yourself; but, you must do that, you should do that only after impartial consideration of all the evidence in the case and with your fellow jurors. In the

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course of your deliberation, listen to the opposing view; and if you become convinced that the view you hold is incorrect, don't hesitate to change it...on the other

hand, don't surrender an honest conviction merely for the purpose of agreeing. The weight and the credibility of the evidence, as I fully indicated, is with you.

When you do go to the Jury room, which will be in just a moment or a few moments, juror number one will act as your foreman. He will preside over your deliberations. He will have a form on which the verdict is to be recorded. He will also have the exhibits. And I interrupt myself to say, Mr. Foreman, that whenever you come back into the Courtroom, would you always bring, make sure you have everything that was sent out with you. They are in your custody until this case is concluded. You will also, Mr. Foreman, be the spokesman for the Jury in this Court when you return. I have instructed you at length, as to the law. As I indicated, you will not hear the evidence

again. And you have heard all the law that will govern you in your decision in this case. It now will be up to you to make that decision, based upon what you have heard.

My remarks now are not to be understood as encouraging communication. But, if for some reason, some important reason, you have to communicate with me...and I'm the only one, Mr. Foreman, with whom you may communicate at this point...you must do it in writing through the baliff, who will be stationed outside your door; and, as I say, I am not encouraging your communications; I'm not stopping you, however. You have heard the law and you have heard the evidence -- it's now up to you. Bear in mind that you are not to reveal to anyone, how you stand numerically or otherwise, on a verdict until you have reached

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a unanimous verdict on all questions presented to you. When you have reached that unanimous verdict, whenever that is, today or two days from today, then you are simply to advise the baliff that you have reached a unanimous verdict on all issues ... and then you will be brought into the Courtroom where your verdict will be taken and recorded.

I think that concludes what I wish to say to you, both as to the general and specific instructions.

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(Thereupon, the following proceedings were had in open Court, out of the presence of the Jury:)

THE COURT: Okay, gentlemen.

MR. GENN: If the Court please, on behalf of the Plaintiff, I would renew my objections....

(discussion on verdict form omitted)

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(C.A.App. 206)

MR. GENN: Your Honor, it would be at this time, that on behalf of the Plaintiff, I would renew my objections to the instructions, renew them in this form: first, I stated some of them in the opening session. And perhaps not regretably, but in any event, the fact is it was not until today, (there was) a method by which they could be put on a record, except for our specific filing of such instructions. That has been done, they have been referred to. I would simply emphasize that the Court, in addition, did not grant besides those that we have given, 1 through 24, and the multiples, A. B, and C., that I referred to...we did ask for ordinary negligence instruction, and instruction on apportionment.

THE COURT: Well, excuse me. You're referring to your submission, are you not, now?

MR. GENN: Yes....

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(C.A.App. 207)

THE COURT: Well, would you like me just to file these right now.

MR. GENN: I would like all of them, in the interest of saving time -- unless the Court insists that you want me to go through them one by one as to which one.

THE COURT: I'm perfectly willing to file them all --

MR. GENN: And treat them as my objections to the instructions.

THE COURT: If you want to except to the fact that I didn't given them and I'll just file them. Now, I have 24 there.

***

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER	)	
Plaintiff	)	
v.	)	Nos. 73-294-B 73-295-B
NATIONAL PERMANENT SAVINGS AND LOAN ASSOC., AND GRANT STARKEY	)	
Defendant	)	C.A.App. 127 R. 607-611
	)	

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS NO. 8B

With respect to the initial arrest and imprisonment the Court instructs you as follows:

It is undisputed that Mr. Clipper was arrested; that he was imprisoned; that his right to be free from confinement was violated; and that Mr. Clipper was innocent of all the criminal charges against him.

Under the law there is imprisonment if one intends to restrain the liberty or causes the confinement of another whether one is jailed or not. If there is such a restraint and it is intentional, there is a claim for the interference with the person, unless the restraint or confinement is legally justified.

In this aspect of the case - - - which we will call

false arrest or false imprisonment - - - malice or a desire to injure is not a necessary element. Malice may aggravate the wrong and call for punitive damages or it may mitigate the damage, but it is not a necessary element to prove a claim against one who has invaded one's right to be free of confinement.

C.A.App. 128

Legal justification for the confinement means exactly that, a legal justification. And once the fact of imprisonment is established as admitted here, the burden is not upon the Plaintiff, Mr. Clipper, but on the Defendants to show the legal justification.

You are instructed that if you find that there was no legal basis for Mr. Clipper's initial arrest, under the standards I hereafter give you, or if you find that thereafter he was detained or held beyond a reasonable time, whether or not carelessly or negligently, then you may find an improper intrusion on his interest in being free, and thus his right to recover.

Under the common law, one may not be validly arrested or confined merely on the basis of a suspicion; nor on the basis that one is said to resemble someone who committed an offense; nor even if one was listed as an owner of a vehicle used in an offense, may he be

arrested for an offense; nor even if both occurred. Thus if you find that the only basis upon which this arrest was made, and confinement followed, was that the witnesses claimed that Mr. Clipper may have resembled the culprit and that a vehicle in his name was used in the robbery, then irrespective of all other matters (such as whether there was a proper investigation, or what a proper investigation would have turned up or what was in the bank cameras or what officer Wortman said, or even whether there was malice), then the arrest and confinement and their consequences were wholly without legal justification and Mr. Clipper is entitled to such damage as you find on the basis of the instructions I hereafter give.

In this regard, I remind you that the burden of legal justification falls on the defendants to show you more than what I have stated.

C.A.App. 129

The defendants do not assert that there were fingerprints or physical evidence tying Mr. Clipper to the robbery, with the one exception that the vehicle driven by his son-in-law was listed in his name.

Putting aside other matters that Mr. Clipper has

pointed to that relate to other aspects of the case, and directing your attention only to the issue of whether there was a positive, definite identification, which is the only significant basis upon which the defendants justify the arrest, if you find that no definite and positive identification was made then on that basis alone, and without regard to the other matters I hereafter allude to, you may find for Mr. Clipper on the issue of legal justification. This is so because in this case and under the law, unless there was at least a positive, definite identification of Mr. Clipper, there was no legal basis to arrest or confine him. This is not to say that a positive definite identification creates a full defense at all, but that without it, there is a lack of legal justification.

Furthermore, if any so-called "positive" and definite identification by photograph was made, but the Bank employees or witnesses and the defendants knew that they could not so positively identify, if in fact they did, and hence knew that they could not identify with relative certainty, that too would deprive the arrest and confinement of justification.

Furthermore, even if the so-called identifications were made only negligently or carelessly you are instructed that, if you find the other elements I mention, you may find for Mr. Clipper on this ground as well. This is so because under the law, if the persons making the identifications, while acting for the Bank, made those so-called "identifications" negligently or carelessly or if as a result of the Bank's failure to have proper procedures which would have C.A.App.130 prevented the misidentifications here and that negligence was either a significant concurring cause or a proximate cause of Mr. Clipper's arrest or confinement, then I instruct you that the defendant Bank, National Permanent, may be held liable for the damages caused.

In this regard you may consider all of the circumstances to determine whether the acts of the Bank's employees and the Bank itself were reasonable.

For example, you might find, under all the surrounding circumstances here; that the Bank employees should not have attempted an identification; or that the Bank should have instructed or required its manager and its employees to examine the film in the bank camera before making any alleged identification (positive

or otherwise), if indeed any was in fact made; and if you find that a reasonable person or business would have so instructed its employees then both the Bank, and the employees for which it is liable, were negligent; and if you find that as one consequence of that negligence Mr. Clipper was arrested and confined, then you may find for him on the theory of negligent invasion of his interest in being free from arrest or confinement.

Further, you may find the Bank liable if it approved or if it did what the law calls "ratify" the acts of the employees, even if those acts amounted to willful acts of the giving of false information, or a knowingly false identification.

Finally, if the Bank had or should have had information in its possession at the time involved (for example, either the camera photo undeveloped that should have been seen earlier, or the actual developed pictures later seen), and you are satisfied that that information would require a reasonable person either to refuse to offer an identification of Mr. Clipper as the robber, or would have required that person immediately to retract any erroneous identification; and if you find those facts here; and if you find that the

C.A.App. 131

continued detention of Mr. Clipper and/or the continuation of the charges against him flowed from those acts, then you may find for Mr. Clipper under this theory as well, in such an amount you may find he is entitled to under the damage instructions I will hereafter give.

You should remember, as I have said, that all persons are required to act reasonably with respect to all other persons; that where a person has suffered a wrong the law will ususlly afford the victim of the wrong a recovery against the person or business causing that wrong, unless that business or person has a privilege or right or justification that the law recognizes as taking priority over or which it balances against that wrong; and that where a person's right or interest in being free and unconfined or unrestricted is invaded by another, whether the act that leads to the restraint or confinement itself is negligent or it is willful, the injured person may recover, so long as there is actual damage to the victim and knowledge by the wrongdoer or tortfeasor that the act will lead to a restraint on another's freedom.

As I have said, the burden of justifying what is an

invasion of the interest or right of another to be free, falls on the one who brings about, directly or indirectly or concurrently with another, the confinement of an innocent person.

C.A.App. 132

The same principles apply to Mr. Starkey, the police officer, as apply to National Permanent and its employees.

It is for you and you alone to decide whether separately or together they did or did not unjustifiably interfere with Mr. Clipper's legally protected interest or right to be free from an arrest, restraint and confinement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER Plaintiff	)	
v.	)	No. 73-294-B 73-295-B
NATIONAL PERMANENT FEDERAL SAVINGS AND LOAN ASSOC., and GRANT STARKEY Defendants	)	(C.A.App. 133; R. 612-613)

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS NO. 8C

You are instructed that Mr. Clipper may recover not only on the basis of showing to your satisfaction that his recognized right to be free from arrest or confinement was unjustifiably invaded, either at the outset or by an improperly continued detention, but he may also recover for what occurred after the initial arrest and imprisonment, for what is called a malicious prosecution. Malicious prosecution involves the groundless instituting or continuation of a criminal proceeding. It comes under that theory of the law which attacks misuse of legal process.

As I have said, it is undisputed in this case that Mr. Clipper is innocent of charges of armed robbery,

kidnapping and attempted murder placed against him. The issue in this regard is whether, independent of the unjustified invasion of his right to be free, Mr. Clipper also may no recover because the institution of the criminal proceeding was itself wrongful. While it may be that many of the facts that go into your determination of this question are similar to those already considered with regard to the claim of his right C.A.App. 134 to be free of confinement, and there may be some overlapping of similar words or phrases, the interests or rights involved are approached somewhat differently. The misuse of the process may result in invading the right to be free and so may bring about similar damage, because the victim of the wrongful prosecution is the same person whose liberty may have been improperly invaded or restrained at the outset; and the invasion of the right to be free that I spoke about already may be made through the criminal process. But each starts from and points to a different question, even though the end result in damages, if you find for Mr. Clipper, may not be greatly different.

The law states that one may not maliciously prosecute another, not only because of concern over the injury

to the person, but also because of concern for perversion or misuse of legal proceedings.

One in fact can have a restraint or even an arrest or confinement without any criminal proceedings and in most instances of pure "false arrest or imprisonment" that is what is usually charged - - - not a formal arrest with a warrant and not an imprisonment in jail but holding of the person or wrongful detaining. In those cases, it is not a false formal arrest or confinement in jail that is being considered, but an improper and unjustified intrusion on the right or interest of a person to be free from any restraints with or without legal papers.

In this aspect of the case we do not start with the interest or right of the person harmed, but with the possible misuse of the criminal proceeding or what is termed, a wrongful prosecution. C.A.App. 135

To determine whether there has been that misuse in the case of criminal charges, the law of this jurisdiction has set forth these elements or factors: (1) a criminal proceeding, aided or assisted or instigated by the defendant or ratified by it. In this regard, the

defendant need not swear out the warrant but it may be done by the police. While the bank denies it aided or assisted to the degree required by the law, I instruct you that if you find that the Bank employees either did more than merely give information or alternatively, if you find that the Bank was the Complainant or if you find that the Bank, by its acts and words ratified and approved this proceeding, then you may find that Mr. Clipper has met the first requirement to show sufficient participation of the Bank, under the law to render it liable. Of course, Mr. Starkey does not deny his active part in regard to the criminal proceedings. (2) The next element is the termination of the proceeding in favor of the accused. Here, I instruct you, and the defendants do not deny that this element is satisfied because it is agreed that the charges were ultimately dismissed because of Mr. Clipper's innocence. (3) The third element is for Mr. Clipper to show lack of probable cause. I instruct you that if you find, contrary to the statements of Mr. Starkey, that there were no positive and definite identification in this case, then on that ground alone (there being no other

sufficient evidence in itself to create more than a suspicion), you may find a lack of probable cause. I further instruct you that if so-called "positive" identifications were given Mr. Starkey, but they were given falsely by the Bank employees, that too would show there was no probable cause. In this regard, however, to hold Mr. Starkey responsible you would have to find that he knew or should have known of such falsity. Furthermore, as to any claimed identification, I instruct you that if you believe Mr. Clipper's testimony or evidence regarding leads or names of persons who could show his whereabouts and/or his testimony about officer Wortman's statement that he was not the man, then I instruct you that the failure to follow those leads and their information, in these circumstances, may, if you believe it would have led to evidence of Mr. Clipper's innocence and if there were no pressing need for an immediate arrest, negate any probable cause. If you find this to be so, then independent of all other factors, I instruct you there was no probable cause from the institution of these criminal proceedings. (4) The fourth element is malice - - - but malice can be inferred and assumed from any lack of probable cause,

C.A.App. 136

or it may be found in fact from all the circumstances.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER	)	
Plaintiff	)	Nos. 73-294-B
v.	)	73-295-B
NATIONAL PERMANENT SAVINGS AND LOAN ASSOCIATION, AND GRANT STARKEY	)	C.A.App. 137; R. 615-616
Defendants	)	

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS NO. 8D

In deciding the issues of fact related to the principles on which I have instructed, you may find the following further principles useful.

First, as I have said, it is not necessary that the Bank or its employees actually sign the Complaint. If they were more than merely and solely information-givers; or if they took some active part; or if the proceeding was ratified or approved after its institution, that may be enough.

Secondly, you may consider the fact that as a general rule photographic viewing is often less reliable than a live line-up and that if only the photograph of Mr. Clipper was shown (as testified to here by at least one of the Bank's employees), the law considers that

process so unduly suggestive as to render any identification as either constitutionally defective or so suspect that it ought to be rejected unless there is compelling reason to accept it. A one-picture show up, if it occurred, is generally unconstitutionally suggestive.
C.A.App. 138

Thirdly, it has been said that perhaps most miscarriages of justice by way of wrongful charges against the innocent have arisen from errors in identification; and as a result that process must be carefully scrutinized to be reasonably certain that it was fair and lacking in suggestiveness.

Fourthly, you may consider all of the circumstances including the experience of the persons involved, their knowledge of the results of any wrongful identification, their awareness of the bank camera photographs, the probability that Mr. Clipper, if he were guilty, would have gone to the station and like matters, to determine if they acted either unreasonably or willfully or in reckless disregard of Mr. Clipper's rights or as a result of a racial bias or discrimination.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER	)	
Plaintiff	)	
v.	)	Nos. 73-294-B 73-295-B
NATIONAL PERMANENT SAVINGS AND LOAN ASSOCIATION and GRANT STARKEY	)	(Consolidated)
Defendants	)	

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS NO. 8E

You are instructed that if the bank acted negligently either in allegedly identifying Mr. Clipper through its employees or failing to have proper procedures which might prohibit or prevent an erroneous identification and that was the proximate cause of Mr. Clipper's damage then you may find for him.

C.A.App. 139
R. 683

and restraints on Mr. Clipper here involved; and Officer Starkey also knew this and they acted for each other. The plaintiff asserts that these events were racially motivated, that a white man would not have received the same treatment both before and after the infliction of the wrongs and the restraints on his liberty. The willful and negligent wrongs of the employees are imputable to the bank. Further, in addition to the negligence of its employees, the bank was negligent in failing to supervise them properly in this matter or set forth proper rules or procedures earlier, including requiring them to examine the bank's camera of the events before making an identification. The plaintiff denies the defendants acted in good faith. Plaintifr also rests on sum-total of alleged facts to support all claims.

C.A.App. 101

2. The defendants deny that they either willfully or negligently violated the rights of the plaintiff, and they deny that he is entitled to recovery against them for the alleged false arrest, false imprisonment or malicious prosecution, or negligent invasion of his rights or interests. Specifically, defendant bank

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER	)	
Plaintiff	)	
v.	)	Nos. 73-294-B 73-295-B
NATIONAL PERMANENT SAVINGS AND LOAN ASSOCIATION and GRANT STARKEY	)	(Consolidated)
Defendants	)	

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS NO. 8F

You are instructed that while the ordinary citizen should cooperate with the police in giving information and the bank employees should do likewise you may also consider the extent to which a bank employee has information available to him or her than an ordinary citizen would not, or has received any special training that an ordinary citizen has not which might require of that employee a higher or different standard than the ordinary citizen.

C.A.App. 140 R. 684

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER, Plaintiff	)	
-vs-	)	
NATIONAL PERMANENT etc., and GRANT STARKEY	)	Civil 73-294B & 73-295B
Defendants	)	(Consolidated)

(C.A. 141; R. 617)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9

You are instructed that if Mr. Mohler, on May 15, 1971, positively identified Mr. Clipper as the robber from photographs he was shown, and if at that time he knew he could not give a positive identification, and if you find that he misrepresented his state of mind in this regard, then you may find that there was a sufficiently false identification of a sufficiently willful and knowing nature as the law may require to constitute an actual and knowingly false identification.

Further, you are instructed that even if you find from the evidence that Mr. Mohler or any other bank employee - - - for all of whose actions the Bank would or should be liable - - - indicated positively that Mr.

Clipper was the robber at a time when they knew that they were not able to make such a positive identification, then, having falsely made a positive identification when it was known by him or any of them that non could be made, then you finding will be for Mr. Clipper on this element of the case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER,)

Plaintiff)

- vs -)

NATIONAL PERMANENT etc., and GRANT STARKEY) Civil 73-294B & 73-295B

) (Consolidated)

Defendants)

C.A.App. 142; R. 618

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS NO. 10

A. If one makes an identification that one knows one cannot make, that is considered sufficient in the law to constitute a knowingly false identification and to hold that person so making the identification responsible.

B. To knowingly misrepresent the degree or ability to make an identification is, in the law, similar to knowing one has given a false identification.

C. You may find that a knowingly given false identification was made on the basis of an examination of the evidence used to make it as well as the surrounding circumstances. In this case it could be based on an examination of the photographs alone.

C.A.App. 142 R. 618

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER,	)	
Plaintiff	)	
-vs-	)	
NATIONAL PERMANENT etc., and GRANT STARKEY	)	Civil 73-294B & 73-295B
	)	(Consolidated)
Defendants	)	

PLAINTIFF'S PROPOSED INSTRUCTION No. 11

The Court instructs you that there may be liability or responsibility on the part of the bank if any one of its employees made a positive identification of Mr. Clipper, or what was called a positive identification, when that employee knew that no positive identification could be made by him or her; and if that act caused or led to or contributed to the detention, arrest, proceedings and/or their continuation and the damages or losses claimed.

C.A.App. 143 R. 619

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER,	)	
Plaintiff	)	
-vs-	)	
NATIONAL PERMANENT etc., and GRANT STARKEY	)	Civil 73-294B & 73-295B
	)	(Consolidated)
Defendants	)	
		C.A.App. 144; R. 621

PLAINTIFF'S PROPOSED INSTRUCTION NO. 12 Alt.

If you find from the evidence that the bank, through its employees or any one of them, participated voluntarily in the prosecution of Mr. Clipper, and that the prosecution was carried on with the approval, support or consent of that employee, then if all of the other elements of the wrong complained of are present, the bank is liable for damages caused, if any.

And it is not necessary that the bank employees participate in swearing out a warrant to be held liable, so long as they, or any of them either instigated a criminal action against Mr. Clipper or voluntarily aided or even assisted in the bringing of the charges, that resulted in the wrongful continuation of those

charges.

You may find or infer that the bank voluntarily aided or assisted in the bringing of the criminal charges, or in their wrongful continuation, from the actual conduct of any of its employees, from any false testimony given by any of them, or from acts which to your mind suggest willfulness or more than a mere good faith attempt to supply truthful information or such information as was honestly known or believed to be truthful.

C.A.App. 144 R. 621

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER,	)	
Plaintiff	)	
-vs-	)	
NATIONAL PERMANENT etc., and GRANT STARKEY	)	Civil 73-294B & 73-295B
	)	(Consolidated)
Defendants	)	

PLAINTIFF'S PROPOSED INSTRUCTION No. 13

In determining probable cause, you may or should consider not only what was allegedly actually known to the defendants, but those facts or matter or evidence which it might be reasonably expected for the defendants to know or learn before the filing of the charges; or which they could have learned or known before the filing of the charges.

C.A.App. 145 R. 672

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER	)	
Plaintiff	)	
v.	)	Nos. 73-294-B 73-295-B
NATIONAL PERMANENT SAVINGS AND LOAN ASSOCIATION and GRANT STARKEY	)	(Consolidated)
Defendants	)	C.A.App. 146; R. 680

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS NO. 13B

You are instructed that as to the malicious prosecution claim against either or both defendants, if you find that there was no probable cause under the instructions I have given, that finding of no probable cause creates an inference of malice in itself which shifts the burden of showing no malice to the defendants. In that sense, Mr. Clipper may rest on the prima facie showing of lack of probable cause based on knowingly false identification or unreasonable belief in guilt or what facts a proper investigation would reveal, or the like, earlier referred to. Thus, once there is a finding of no probable cause for these reasons, it is

then the defendants' burden to show no malice. If they do not over come that burden, then Mr. Clipper has met his need to show that essential element.

Malice may exist where there is a reckless or callous disregard of the rights of another.

In my instructions on punitive damages, when I referred to the work "maliciously", I defined it as meaning willful, wanton or oppressive acts. I stated that wanton acts are those that are taken in reckless and callous disregard of the rights of the plaintiff. C.A.App. 147 What I said there about the term "maliciously" applies to the word "malice". Legal malice is not, therefore, always equal to a personal actual malice. It may include an indifference to the rights of Mr. Clipper.

Malice, of course, is not a necessary element of the Civil Rights statutes violations.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER, Plaintiff -vs- NATIONAL PERMANENT etc., and GRANT STARKEY, Defendants	)	Civil 73-294B & 73-295B (Consolidated) C.A.App. 148; R. 625

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14

The Court instructs you that the responsibility for the arrest, imprisonment, criminal proceedings and such other damages, losses or wrongs that you may find were committed against Mr. Clipper under the other instructions I have given, cannot be shifted to the Federal Bureau of Investigation or its agents under the law, by either defendant.

Further, I instruct you that there is no evidence in this case that the primary law enforcement functions were being performed by the FBI; and I instruct you that the charges placed against Mr. Clipper are charges of a

kind which can be brought by the Takoma Park Police, if otherwise valid and proper; or may be made on the complaint of a Bank.

I instruct you that while criminal charges in the State of Maryland are brought in the name of the State of Maryland, that is no evidence at all that they were not initiated or instigated or otherwise aided or assisted by the Bank in this case, sufficiently to hold it responsible. In this regard, all criminal charges of a serious nature are titled in the name of the State C.A.App. 149 but that is only to reflect the titling of the proceeding. Whether a person, or firm or anyone else committed sufficient acts to be held legally responsible for those proceedings is a matter of what the facts show in this regard and what you find; and I have instructed you as to this element previously.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER)
5105 12th Street, N.E.
Washington, D.C. 20011)

Plaintiff)

) Civil Action No. 73-294B

v.

)

NATIONAL PERMANENT FEDERAL
SAVINGS AND LOAN ASSOCIATION)
a National Banking Association
Serve: Joseph Zegowitz)
Registered Agent
7633 New Hampshire Avenue
Langley Park, Maryland 20012

Defendant)

COMPLAINT

First Cause of Action
(False Arrest)

1. The plaintiff, George Clipper, is and was at all times herein a citizen of the District of Columbia. The defendant, National Permanent Federal Savings and Loan Association, is a federally chartered corporation and national banking association, doing business in the State of Maryland, having an office located in the State of Maryland, and as a consequence, independent of other

*C.A.App. 21 R.244

*"C.A.App." refers to Appendix in Court of Appeals

jurisdictional bases, this Court has jurisdiction under Title 28, U.S.C.A., Section 1348, which provides that such corporations, for actions such as this (other C.A.App. 22 actions"), are deemed citizens of the State where located; and further, defendant has a principal place of business in this State at 7633 New Hampshire Avenue, Langley Park, Maryland; and the matter in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest, costs and fees. This Court has jurisdiction under Title 28, U.S. Code, Section 1332. Further jurisdiction is invoked under Title 42, U.S. Code, Sections 1981, et seq., 1983, et seq., 1985, et seq., and further, under Title 28, U.S. Code, Sections 1331 and 1343.

2. On or about May 14, 1971, some time after 1 p.m., at the premises of National Permanent Federal Savings and Loan Association at 7633 New Hampshire Avenue, in Langley Park, Takoma Park, Maryland, within Prince George's County, Maryland, and within the State and the jurisdiction of this Court, it was reported to the Takoma Park Police and Federal Bureau of Investigation by the bank's employees and manager, that a robbery had

taken place at the said bank shortly before; that a certain described male held a gun on the manager of the said bank and announced that it was being "held up;" that others, also armed, threw a bag to one of the tellers and told that person to fill it up; that as these men fled the bank, a Takoma Park motorcycle policeman arrived at the scene, was informed of the incident, and fired at a car in which the men allegedly fled. Two of the men, Garland Jerome Lathan and John David Wood, were taken into immediate custody and charged. The license number of the car involved was apparently obtained at that time. The said vehicle was an automobile listed in this plaintiff's name and purchased for his daughter as a wedding present in late 1970. She resided at 1341 Montague Street, Northwest, in the District of Columbia. Further, one of the arrested men, Garland Jerome Lathan, was this plaintiff's son-in-law, married to the said daughter to whom he had given the said car, and a person whom this plaintiff had not seen for at least three months prior to the alleged events. It was further reported, at the time of the holdup or shortly thereafter, that a third person

C.A.App. 23

involved in the robbery commandered a private car and took the occupants of the car as hostage, but later released them unharmed. On learning of the listed title ownership of the 1970 Mustang, agents of the Federal Bureau of Investigation, that same afternoon and within a short time after the events, questioned the plaintiff at his home at 5105 12th Street, Northeast, in the District of Columbia. At that time, in responding to their questions, the plaintiff truthfully informed them of his purchase of the car for his daughter, the fact he had not seen his son-in-law since February, and did not know where, or if, he worked; and he further told them that his daughter worked for the Army; and that he (the plaintiff) generally worked at the U.S. Department of Commerce in the Systematics Laboratory of the National Museum, but that he was at home that day. He was thereupon informed that the car was impounded at the Takoma Park station where it could be seen. Later that same day, and in the evening, at approximately 10 p.m., the plaintiff went to the station and was informed that the officer handling the matter was one Corporal Starkey (later learned to be Grant A. Starkey),

and who continued to do so thereafter. The plaintiff was questioned by Officer Starkey and was later surrounded and interrogated by other officers. During the interrogation, another officer informed Corporal Starkey that the so-called "third" man had much more hair than this plaintiff, and was otherwise described in a manner that showed no similarity to this plaintiff, and that he (the plaintiff) "was not the man." The plaintiff was then told he could examine the car. He observed bullet holes in the vehicle, that the front and rear windows had been smashed, and other damage to the front. On the following day after the incident, namely, Saturday, May 15, 1971, the plaintiff, who also worked at the Commissioned Officers' Mess at the National Naval Medical Center in Bethesda, Maryland, was at that employment, when, at about 8:15 p.m., while carrying some items outside, he was approached by three men who stated they were Montgomery County police. They handcuffed him and, in response to his questions about why he was being arrested, told him they did not know, but that they had a warrant for his arrest. Plaintiff was taken to the Bethesda, Maryland station, booked, photographed and fingerprinted. The

handcuffs were put back on, and eventually he was taken back to the Takoma Park station by Corporal Starkey, who had since arrived. He was told by the said Starkey that he (Starkey) "didn't want any trouble," and when asked what that meant, Starkey placed his hand on his gun. Plaintiff was repeatedly questioned about the participants, and repeatedly responded that he was innocent, that he knew nothing about the robbery, and that he would submit to any kind of test to prove his innocence. He was later brought to the Hyattsville station where the same booking process was repeated; and he was told he was being held and would be charged with kidnapping, armed robbery, and attempted murder. He was also asked by Corporal Starkey, at or about this time, if he knew one Millard Clipper. When the plaintiff replied that he was a cousin, whom he knew as "Toby," Starkey responded C.A.App. 25 that he (Millard Clipper) had given Starkey "a hard time" and that, in substance, it would not happen again, and that he (Starkey) would make up for it and make sure of it. Plaintiff was thereafter placed in a cell with a mattress on the floor, and he remained in that cell until Monday, May 17, 1971. On that date

he was taken to Court. He was formally charged with two separate charges of kidnapping, armed robbery, and assault with intent to murder (Criminal Case Numbers 24559, 24560, 24561 and 24562 in the then People's Court). Bond for his release was ultimately set in the Court at Upper Marlboro at $125,000, a sum that the plaintiff could not meet, and which all knew or should have known he could not meet, and which all knew or should have known he could not meet or post. After having been jailed on May 15 and 16, he was further caused to remain in jail on Monday, May 17, 1971, Tuesday, May 18, Wednesday, May 19, Thursday, May 20, and Friday, May 21, 1971, on which date the Court ultimately reduced the bond to $10,000. That sum was met by payment of bond costs and by plaintiff's brother offering his home as security.

3. The plaintiff was further informed that during his incarceration agents of the Federal Bureau of Investigation obtained a search warrant for his home (on or about May 17, 1971), and proceeded to search it in a manner which amounted to a ransacking, causing much loss and damage.

4. During the said incarcerations, the plaintiff

suffered not only the expected or foreseeable damages resulting from arrest and confinement, but also, among other things, indignities and affronts; and due to improper heating, diet and jail conditions, he further contracted a severe head cold and chest cough, laryngitis, acute nasopharyngitis, injuries to the fingers and hand from the handcuffs and treatment of the officers, aggravation of his pre-existing ulcer, and other injury, loss and damage; and he further suffered great humiliation and embarassment, emotional distress; anxiety and apprehension, defamation of character, and other and further damage, including impairment of reputation; and fears and anxieties, and other injury and loss which continue to this day and are permanent, and will continue for his lifetime; and further, the plaintiff was caused to be in Court on other days and in other proceedings, and to obtain and pay for his counsel and other costs; and to incur medical bills; and to suffer loss of work and wages and income; and to have his wage-earning capacity reduced in that, among other things, these events did, and will, restrict his opportunities for other work requiring trust and lack of incident; and he was also

C.A.App. 26

caused to suffer the permanent damage of an arrest record of the kind here; and to incur other and continuing damage, loss and injury, all of which flowed from, and resulted from, the wrongful actions of this defendant bank as averred herein.

5. Finally, in July of 1971, the charges against this plaintiff were all dismissed; and the same were finally dismissed and terminated in this plaintiff's favor because the arrest was false and wrongful; and because it was brought, initiated and maintained on no proper basis and without probable cause; and because the imprisonment was wrongful and its continuation wrongful; and because the initiation and continuation of the charges and incarceration had no legal basis; and such, plaintiff avers, are the facts herein.

C.A.App. 27

6. The plaintiff was falsely arrested in that the charges against him were wholly untrue; and the imprisonment of the plaintiff was against his will and without basis in law and fact. The defendant bank herein knew or should have known such facts; and further, defendant failed, or refused, or neglected, to take reasonable action either to ascertain or correct the falsity of the arrest or imprisonment; and failed,

refused and neglected to make all reasonable and necessary factual investigation regarding the charges or their continuation permitted by, the negligent, willful and wrongful acts of this defendant bank; or in conjunction with others.

7. Further averring, plaintiff alleges that at all times mentioned herein the defendant bank maintained or should have maintained, a moving picture "panning" process designed to deal with events of this kind; and plaintiff is informed that the bank and its employees had photographic materials available, or should have disclosed, to the police and Federal agents, and had they done so, none of the damages and matters herein would have been initiated; and the same would have shown the plaintiff's innocence of any wrongdoing, but they were concealed, although available at all times herein or even if improperly initiated, they would not have been continued and maintained; and further, the said bank and its employees knew or should have known the aforesaid facts heretofore averred before making or causing the false identification of the plaintiff; and they knew or should have known that the plaintiff did not meet the description given,

C.A.App. 28

and was not the person their own pictures showed or should have shown; and they knew or should have known that the identification given of this plaintiff was wrongful; and it was not in good faith; and further, it resulted from giving incomplete facts or concealing facts; and further, it was in furtherance of, and in conspiracy with, and with knowledge of, the wrongful purposes of Corporal Starkey, and known to be such; and such identification resulted in the wrongful and negligent acts of the defendant and its agents, servants and employees, acting for, or in the course of, defendant's approval, and/or direction, and/or insistence; and the defendant knew or should have known the same, and is responsible for the damages herein, as heretofore averred; and on account of the willfullness and reckless disregard of plaintiff's rights, it is also liable to plaintiff for punitive damages for causing, initiating, bringing, maintaining, and failing to cause the early dismissal of the false arrest and false imprisonment herein.

WHEREFORE, the premises considered, in this First Cause of Action, plaintiff prays that he be awarded

damages against the defendant bank, National Permanent Federal Savings and Loan Association, a national banking association, in the sum of Two Hundred and Fifty Thousand Dollars ($250,000) as compensatory damage, with interest from May 15, 1971, and costs, and punitive damages of One Hundred Thousand Dollars ($100,000), and attorney's fees and costs, or such further sum as is just.

C.A.App. 29

Second Cause of Action
(False Imprisonment)

For his allegations in his Second Cause of Action, the plaintiff, George Clipper, realleges, and by reference adopts, all allegations contained in his First Cause of Action, and in addition, alleges and states as follows:

A. The defendant, or its officers, agents, employees and/or servants did at all times herein, and in the manner heretofore set forth, cause, initiate, institute, fail to prevent, and/or continued or caused to be continued, the false imprisonment of this plaintiff, and his restraint caused the damages heretofore alleged on account thereof; and the same were committed wholly

without legal cause or justification and warrant the judgement herein.

B. The defendant, or its officers, agents, employees and/or servants, falsely imprisoned, or caused the false imprisonment of the plaintiff against his will, and repeatedly refused and neglected to take reasonable or necessary action to ascertain the falsity of plaintiff's imprisonment, and they failed to exercise reasonable diligence in respect thereto, all of which would have diminished such damage; and their failures in this regard were willful and malicious.

C.A.App. 30

WHEREFORE, the plaintiff prays that on his Second Cause of Action, he be awarded damages against the defendant bank, National Permanent Federal Savings and Loan Association, a national banking association, in the sum of Two Hundred and Fifty Thousand Dollars ($250,000), as compensatory damage, with interest from May 15, 1971, and costs, and punitive damages of One Hundred Thousand Dollars ($100,000), and attorney's fees and costs, or such further sum as is just.

Third Cause of Action
(Malicious Prosecution)

For his allegations in his Third Cause of Action, the plaintiff, George Clipper, realleges, and by reference adopts, all allegations contained in his First and Second Causes of Action, and in addition, alleges and states as follows:

A. The defendant, or its officers, agents, employees and/or servants, did at all times herein, and in the manner heretofore set forth, cause, initiate, institute, fail to prevent, or continued the prosecution of this plaintiff, maliciously; and it is responsible for its institution and/or continuance, and the damages resulting therefrom as heretofore averred.

B. The felony criminal proceedings herein instituted and continued, or not prevented by defendant due to defendant's wrongful acts and negligence were wholly without legal or probable cause, and were so instituted and continued with malice, and the same terminated in plaintiff's favor, as they were required to do because of his absolute innocence.

C.A.App. 31

WHEREFORE, the plaintiff, George Clipper prays that, on his Third Cause of Action, he be awarded

damages against the defendant bank, National Permanent Federal Savings and Loan Association, a national banking association, in the sum of Two Hundred and Fifty Thousand Dollars ($250,000), as compensatory damage, with interest from May 15, 1971, and costs, and punitive damages of One Hundred Thousand Dollars ($100,000), and attorney's fees and costs, or such further sum as is just.

/s/

GEORGE CLIPPER, Plaintiff
5105 12th Street, N.E.
Washington, D.C. 20011

BROWN, GENN, BROWN AND KARP

By /s/

Edward L. Genn
8720 Georgia Avenue, Suite 202
Silver Spring, Maryland 20910 JU. 8-2820
Attorneys for Plaintiff

JURY DEMAND

PLAINTIFF DEMANDS A TRIAL BY 12 JURORS OF THE ISSUES HEREIN.

/s/

Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER
5105 12th Street, N.E.
Washington, D.C. 20011

Plaintiff

v.

Civil Action No. 73-295B

PRINCE GEORGE's COUNTY
a governmental entity
c/o County Attorney
Courthouse
Upper Marlboro, Maryland 20870

TAKOMA PARK, MARYLAND
a municipal corporation or entity
c/o Mayor of Takoma Park
7500 Maple Avenue
Takoma Park, Maryland 20012

and

GRANT A. STARKEY
c/o Takoma Park Police Station
Takoma Park Police Station
Takoma Park, Maryland 20012

Defendants

COMPLAINT

R.6
C.A.App. 32

First Cause of Action
(False Arrest)

1. The plaintiff, George Clipper, is and was at all times herein a citizen of the District of Columbia.

The individual defendant, Grant A. Starkey, is and was at all times herein a citizen of the State of Maryland, who was employed as a corporal in the Takoma Park Police Department within this State. The defendants, C.A.App. 33 R.6 Takoma Park, Maryland, and Prince George's County, are both municipal corporations and/or governmental bodies in the State of Maryland. The matter in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest, costs and fees. This Court has jurisdiction and it is invoked herein under the Federal Civil Rights statutes, including Article 42, U.S. Code, Sections 1981, et seq., and 1983, et seq., and 1985, et seq., and under Title 28, U.S. Code, Sections 1331, 1332 and 1343, and otherwise.

2. At all times mentioned herein, the defendant, Grant A. Starkey, acted for and on behalf of, and/or with the knowledge of, and/or in concern with, and/or in conspiracy with the remaining defendants or their authorized officials, officers, agents and employees; and the defendants, Takoma Park and Prince George's County, are responsible therefore, and are not, or should not be, immune from responsibility or liability herein, or for the relief prayed hereafter; and they did cause

the damages hereinafter asserted.

3. On or about May 14, 1971, some time after 1 p.m., at the premises of National Permanent Federal Savings and Loan Association at 7633 New Hampshire Avenue, in Langley Park, Takoma Park, Maryland, within Prince George's County, Maryland, and within the State and the jurisdiction of this Court, it was reported to the Takoma Park Police and Federal Bureau of Investigation by the bank's employees and manager, that a robbery had taken place at the said bank shortly before; that a certain described male held a gun on the manager of the said bank and announced that it was being "held up;" that others, also armed, threw a bag to one of the tellers and told that person to fill it up; that as these men fled the bank, a Takoma Park motorcycle policeman arrived at the scene, was informed of the incident, and fired at a car in which the men allegedly fled. Two of the men, Garland Jerome Lathan and John David Wood, were taken into immediate custody and charged. The license number of the car involved was apparently obtained at that time. The said vehicle was an automobile listed in this plaintiff's name and purchased

C.A.App. 34

for his daughter as a wedding present in late 1970. She resided at 1341 Montague Street, Northwest, in the District of Columbia. Further, one of the arrested men, Garland Jerome Lathan, was this plaintiff's son-in-law, married to the said daughter to whom he had given the said car, and a person whom this plaintiff had not seen for least three months prior to the alleged events. It was further reported, at the time of the holdup or shortly thereafter, that a third person involved in the robbery commandered a private car and took the occupants of the car as hostage, but later released them unharmed. On learning of the listed title ownership of the 1970 Mustang, agents of the Federal Bureau of Investigation, that same afternoon and within a short time after the events, questioned the plaintiff at his home at 5105 12th Street, Northeast, in the District of Columbia. At that time, in responding to their questions, the plaintiff truthfully informed them of his purchase of the car for his daughter, the fact he had not seen his son-in-law since February, and did not know where, or if, he worked; and he further told them that his daughter worked for

the Army; and that he (the plaintiff) generally worked at the U.S. Department of Commerce in the Systematics Laboratory of the National Museum, but that he was at home that day. He was thereupon informed that the car
C.A.App. 35
was impounded at the Takoma Park station where it could be seen. Later that same day, and in the evening, at approximately 10 p.m., the plaintiff went to the station and was informed that the officer handling the matter was one Corporal Starkey (later learned to be Grant A. Starkey), and a defendant herein. The plaintiff was questioned by Officer Starkey and was later surrounded and interrogated by other officers. During the interrogation, another officer informed Corporal Starkey that the so-called "third" man had much more hair than this plaintiff, and that he (the plaintiff) "was not the man." The plaintiff was then told he could examine the car. He observed bullet holes in the vehicle, that the front and rear windows had been smashed, and other damage to the front. On the following day after the incident, namely, Saturday, May 15, 1971, the plaintiff who also worked at the Commissioned Officers' Mess at the National Naval

Medical Center in Bethesda, Maryland, was at that employment, when, at about 8:15 p.m., while carrying some items outside, he was approached by three men who stated they were Montgomery County police. They handcuffed him and, in response to his questions about why he was being arrested, told him they did not know, but that they had a warrant for his arrest. Plaintiff was taken to the Bethesda, Maryland station, booked, photographed and fingerprinted. The handcuffs were put back on, and eventually he was taken back to the Takoma Park station by Corporal Starkey, a defendant herein, who had since arrived. He was told by the said Starkey that he (Starkey) "didn't want any trouble," and when asked what that meant, Starkey placed his hand on his gun. Plaintiff was repeatedly questioned about the participants, and repeatedly responded that he was innocent, that he knew nothing about the robbery, and that he would submit to any kind of test to prove his innocence. He was later brought to the Hyattsville station where the same booking process was repeated; and he was told he was being held and would be charged with kidnapping, armed robbery, and attempted murder. He was also asked by

C.A.App. 36

Corporal Starkey, at or about this time, if he knew one Millard Clipper. When the plaintiff replied that he was a cousin, whom he knew as "Toby," Starkey responded that he (Millard Clipper) had given Starkey "a hard time" and that, in substance, it would not happen again, and that he (Starkey) would make up for it and make sure of it. Plaintiff was thereafter placed in a cell with a mattress on the floor, and he remained in that cell until Monday, May 17, 1971. On that date he was taken to Court. He was formally charged with two separate charges of kidnapping, armed robbery, and assault with intent to murder (Criminal Case Numbers 24559, 24560, 24561 and 24562 in the then People's Court). Bond for his release was ultimately set in the Court in Upper Marlboro at $125,000, a sum that the plaintiff could not meet, and which all knew or should have known he could not meet or post. After having been jailed on May 15 and 16, he was further caused to remain in jail on Monday, May 17, 1971, Tuesday, May 18, Wednesday, May 19, Thursday, May 20, and Friday, May 21, 1971, on which date the Court ultimately reduced the bond to $10,000. That sum was met by payment of bond costs and by

plaintiff's brother offering his home as security.

C.A.App. 37

4. The plaintiff was further informed that during his incarceration agents of the Federal Bureau of Investigation obtained a search warrant for his home (on or about May 17, 1971), and proceeded to search it in a manner which amounted to a ransacking, causing much loss and damage.

5. During the said incarcerations, the plaintiff suffered not only the expected or foreseeable damages resulting from arrest and confinement, but also, among other things, indignities and affronts; and due to improper hearing, diet and jail conditions, he further contracted a severe head cold and chest cough, laryngitis, acute nasopharyngitis, injuries to the fingers and hand from the handcuffs and treatment of the officers, aggravation of his pre-existing ulcer, and other injury, loss and damage; and he further suffered great humiliation and embarassment, emotional distress, anxiety and apprehension, defamation of character, and other and further damage, including impairment of reputation; and fears and anxieties, and other injury and loss which continue to this day and are permanent, and will continue for his lifetime; and further, the plaintiff was caused

to be in Court on other days and in other proceedings, and to obtain and pay for his counsel and other costs; and to incur medical bills; and to suffer loss of work and wages and income; and to have his wage-earning capacity reduced in that, among other things, these events did, and will, restrict his opportunities for other work requiring trust and lack of incident; and he was also caused to suffer the permanent damage of an arrest record of the kind here; and to incur other and continuing damage, loss and injury, all of which flowed from, and resulted from, the wrongful actions of these defendants as averred.

C.A.App. 38

6. The actions hereinabove stated, committed by the defendant Starkey and those with whom he acted in concern or in conspiracy, caused and resulted in the wrongful and false arrest of this plaintiff, and his false and wrongful confinement and restraint of liberty during the aforesaid periods, and the initiation and continuance of the prosecution herein, and the extensions thereof at a time when the defendants and each of them should have caused the discontinuance thereof, and dismissal thereof; and the same were done against the

will of the plaintiff, and with the knowledge, consent, and approval of all the defendants herein, and for the purpose of, and with the result of, the deprivation of the rights, privileges and immunities, and the statutory rights of this plaintiff. While ultimately, in July of 1971, the charges against the plaintiff were finally dismissed and finally terminated in his favor, after the apprehension of a man named Cole, or others, the aforesaid false arrest and its consequential confinement and deprivation of rights, privileges and immunities, caused the damages and loss and injury here alleged; and were wrongfully and improperly carried out by the said defendants as heretofore stated, and under color of State and local law, or authority, or action, or statute, ordinance, regulation, custom, or usage, warranting the relief herein requested; and the said acts were further committed maliciously and without probable cause, and with no legal or valid basis, but solely for the purpose of depriving the plaintiff of said rights.

7. That at all times herein, the defendants and each of them, were and are responsible for the activities hereinbefore stated, which were done with their knowledge,

consent and approval, or pursuant to their practices and policies; and to the extent that any immunity is claimed, the same is against public policy and is otherwise improper and unjustifiable in the circumstances.

WHEREFORE, the premises considered, the plaintiff prays on the First Cause of Action, he be awarded damages against the defendants, jointly and severally, or such of them as may be held responsible, in the compensatory sum of Two Hundred and Fifty Thousand ($250,000), with interest from May 15, 1971, and costs, and punitive damages of One Hundred Thousand Dollars ($100,000), attorney's fees and costs, or such other and further sum as is just.

Second Cause of Action
(False Imprisonment)

For his allegations in the Second Cause of Action, the plaintiff, George Clipper, realleges, and by reference adopts, all allegations contained in the First Cause of Action, and in addition, alleges and states as follows:

A. The defendants did at all times, and in the

manner heretofore set forth, cause, initiate, institute, fail to prevent, and/or continued or caused to be continued, the false imprisonment of this plaintiff, and his restraint, and caused the damages heretofore alleged on account thereof; and the same were committed wholly without legal cause or justification and warrant the judgement herein.

C.A.App. 40

B. The defendants falsely imprisoned, or caused the false imprisonment of the plaintiff against his will, and repeatedly refused and neglected to take reasonable or necessary action to ascertain the falsity of plaintiff's imprisonment, and they failed to exercise reasonable diligence in respect therto, all of which would have diminished such damage; and their failures in this regard were willful and malicious.

WHEREFORE, on the Second Cause of Action, the plaintiff, George Clipper, prays that he be awarded damages against the defendants, jointly and severally, or such of them as may be held responsible, in the compensatory sum of Two Hundred and Fifty Thousand Dollars ($250,000), with interest from May 15, 1971, and costs, and punitive damages of One Hundred Thousand

Dollars ($100,000), attorney's fees and costs, or such other and further sum as is just.

Third Cause of Action
(Malicious Prosecution)

For his allegations in the Third Cause of Action, the plaintiff, George Clipper, realleges, and by reference adopts, all allegations contained in the First and Second Causes of Action, and in addition, alleges and states as follows:

A. The defendants did at all times, and in the manner heretofore set forth, cause, initiate, institute, fail to prevent, or continued the prosecution of this plaintiff, maliciously; and are responsible for its institution and/or continuance, and the damages resulting therefrom as heretofore averred. C.A.App. 41

B. The felony criminal proceedings herein instituted and continued, or not prevented by these defendants, due to their wrongful acts and/or aforesaid negligence, were wholly without legal or probable cause, and were so instituted and continued with malice, and the same terminated in plaintiff's favor, as they were required

to do because of his absolute innocence.

WHEREFORE, on the Third Cause of Action, the plaintiff, George Clipper, prays that he be awarded damages against the defendants, jointly and severally, or such of them as may be half responsible, in the compensatory sum of Two Hundred and Fifty Thousand ($250,000), with interest from May 15, 1971, and costs, and punitive damages of One Hundred Thousand Dollars ($100,000), attorney's fees and costs, or such other and further sum as is just.

GEORGE CLIPPER, Plaintiff
5105 12th Street, N.E.
Washington, D.C. 20011

BROWN, GENN, BROWN AND KARP

By_____

Edward L. Genn
8720 Georgia Avenue, Suite 202
Silver Spring, Maryland 20910 JU. 8-2820
Attorneys for Plaintiff

JURY DEMAND

PLAINTIFF DEMANDS A TRIAL BY 12 JURORS OF THE ISSUES HEREIN.

_____
Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER,)

Plaintiff)

v.)

Civil Action No. 73-294-B

NATIONAL PERMANENT FEDERAL SAVINGS AND LOAN ASSOCIATION,)

Defendant)

(C.A.App. 46; R. 264)

ANSWER

Comes now the defendant, National Permanent Federal Savings and Loan Association, and for answer and grounds of defense to Plaintiff's complaint states as follows:

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted as to the First, Second and Third causes of action.

SECOND DEFENSE

This Court lacks jurisdiction over the subject matter and over the parties to the action.

THIRD DEFENSE

As to the First Cause of Action:

Para. 1. The Defendant admits that it is a federally

chartered corporation and that it is doing business in and has a branch located in the State of Maryland; but defendant denies that it is a national banking association, since it is in fact a federally chartered savings and loan association.

Para. 2. The Defendant admits that on or about May 14, 1971, at approximately 1:10 p.m., a robbery took place at the Defendant's premises at 7633 New Hampshire Avenue, Langley Park, Takoma Park, Maryland, within Prince George's County, Maryland. The Defendant is C.A.App. 47 R. 254 without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein; however, said allegations do not pertain in any way to the Defendant.

Para. 3. The Defendant is without knowledge or belief as to the truth of the allegations contained therein; however, said allegations do not pertain in any way to the Defendant.

Para. 4. The Defendant specifically denies that it committed any wrongful actions, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein,

and demands strict proof thereof.

Para. 5. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

Para. 6. The Defendant specifically denies any and all allegations of wrongdoing on its part contained therein, and as to the other allegations, is without knowledge or information sufficient to form a belief as to the truth of them and demands strict proof thereof.

Para. 7. The Defendant specifically denies any and all allegations contained therein, and demands strict proof thereof.

As to the Second Cause of Action:

Para. A-B: The Defendant specifically denies any and all allegations contained in Paragraph A and B therein, and demands strict proof thereof.

As to the Third Cause of Action:

Para. A-B: The Defendant specifically denies any and all allegations contained in Paragraphs A and B therein and demands strict proof thereof.

WHEREFORE, the answering Defendant demands

judgement against the Plaintiff dismissing the complaint with costs.

MELNICOVE, GREENBERG & KAUFMAN, P.A.

By:_____
Suite 1215
10 Light Street
Baltimore, Maryland 21202
727-2800

STOHLMAN, BEUCHERT, EGAN & SMITH

By:_____
Attorneys for Defendant
800 Union Trust Bldg.
Washington, D.C. 20005
Phone 638-7500

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER 5105 12th Street, N.E. Washington, D.C. 20011	:	
Plaintiff	:	
vs.	:	
PRINCE GEORGE'S COUNTY, a governmental entity	:	Civil Action No. 73-295B
TAKOMA PARK, MARYLAND a municipal corporation or entity	:	(C.A.App. 43; R. 16)
GRANT A. STARKEY	:	
Defendants:		

: : : : : : : : : : : :

ANSWER TO COMPLAINT

Now comes Grant A. Starkey, one of the Defendants, by Patrick A. O'Doherty, and for answer to the Plaintiff's Complaint states:

FIRST CAUSE OF ACTION

1. This Defendant in Answer to Paragraph One of the Complaint says that the apparent basis for the entire action is the Civil Rights Act. This Defendant admits that jurisdiction would be by virtue of 42 U.S.C., Section 1983, but denies that there was any violation of

the civil rights of the Plaintiff. This Defendant denies that the amount of controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive of interests and costs.

2. This Defendant admits that he was acting in behalf of the Police Department of Takoma Park, but states that he did not act in concern or in conspiracy with the remaining Defendants.

C.A.App. 44 R. 16

3. This Defendant has no personal knowledge of all of the facts alleged in Paragraph Three, however, this Defendant emphatically and specifically denies making the statements attributable to him in this Paragraph.

4. This Defendant has no personal knowledge of the facts alleged in Paragraph Four and therefore can neither admit nor deny said allegations.

5. This Defendant denies the allegations of Paragraph Five.

6. This Defendant admits that the Plaintiff was arrested, but emphatically denies that the Plaintiff was arrested falsely and without probable cause and the arrest was made in good faith.

7. This Defendant denies the allegations of

Paragraph Seven and states that the arrest was proper, with probable cause, and made in good faith.

SECOND CAUSE OF ACTION

A. This Defendant denies the allegations of Paragraph A. and states that the arrest was proper and with probable cause and the arrest was made in good faith.

B. This Defendant denies the allegations of Paragraph B. and states that the arrest was proper and with probable cause and the arrest was made in good faith.

THIRD CAUSE OF ACTION

A. This Defendant denies the allegations of Paragraph A. and states that the arrest was proper and with probable cause and the arrest was made in good faith.

C.A.App. 45

B. This Defendant denies the allegations of Paragraph B. and states that the arrest was proper and with probable cause and the arrest was made in good faith.

FIRST AFFIRMATIVE DEFENSE

That the Defendant was performing his duties as a police officer in attempting to arrest the Plaintiff.

SECOND AFFIRMATIVE DEFENSE

That the Defendant acted in good faith and with

probable cause in arresting the Plaintiff.

THIRD AFFIRMATIVE DEFENSE

That the Defendant did not act with wrongful motive, evil intent or with malice and has sovereign immunity as an officer of an agency of the State of Maryland and has not consented to the tiling of this action.

Patrick A. O'Doherty
Attorney for Defendant, Grant A. Starkey
1014 Fidelity Building
Baltimore, Maryland 21201
837-1828

C.A.App.46

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

GEORGE CLIPPER Plaintiff v. *** TAKOMA PARK, MARYLAND, a municipal corporation or entity *** Defendants	)	Civil Action No. 73-295-B CA.App. 48; R. 19

* * * * * * * * * * * *

MOTION TO DISMISS COMPLAINT

Now comes Takoma Park, Maryland, one of the Defendants, by Patrick A. O'Doherty, its attorney, and moves to dismiss the Complaint and for reasons therefor states:

1. The Complaint alleges violation of the Civil Rights Act and is based on 42 U.S.C., Section 1983.

2. Takoma Park, Maryland is not subject to suits under the Civil Rights Act for the reason that this Defendant is not within the ambit of the statute.

3. The Defendant, Takoma Park, Maryland, enjoys sovereign immunity and has not consented to this action.

4. Takoma Park, Maryland is not a "person" within the meaning of 42 U.S.C., Section 1983 and is not subject to suit for damages thereunder.

WHEREFORE, the Defendant, Takoma Park, Maryland, prays that the Complaint be dismissed.

/s/

Patrick A. O'Doherty
Attorney for Takoma Park, Maryland
1014 Fidelity Building
Baltimore, Maryland

Partial Extract for En Banc
Suggestion and Rehearing Petition

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GEORGE CLIPPER,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 76-1629
	)	
NATIONAL PERMANENT SAVINGS AND LOAN ASSOCIATION, A CORPORATION TAKOMA PARK, MARYLAND, A MUNICIPAL CORPORATION AND GRANT STARKEY,	)	
	)	
Appellees	)	
	)	

SUGGESTION FOR REHEARING EN BANC
AND/OR PETITION FOR REHEARING OR FOR MODIFICATION
OF OPINION AND JUDGEMENT BY PANEL

George Clipper, Appellant in this cause, petitions the Court for a partial rehearing pursuant to Rule 40, F.R.A.P., or for a modification of the Opinion and Judgement filed in this cause on October 10, 1980 on grounds and for reasons that follow.

Separately, and for the reasons there stated, Appellant suggests a rehearing en banc on these issues pursuant to Rule 35, F.R.A.P. The panel's Opinion is attached (Pet. Apx. 1-5). */

*/ By timely request which was granted, appellant was given to this date to file his Suggestion and/or Petition.

Introductory Statement with Statement of Counsel and Reasons for Grant of Suggestion or Petition

Pursuant to the Court's directive requiring that counsel identify which of the three allowable situations exist in this case, counsel asserts that they are:

a. Critical material facts and their significance were overlooked and misapprehended. And directly applicable law and cases were similarly overlooked, one of which is as close to an "all fours" case as might be found.

b. Changes in the law which occurred certainly after the Briefs were filed and between that time and oral argument have been overlooked.

c. Cases in this Court are in conflict with the decision.

Before addressing each of these categories more precisely and indeed to point them up, it is of no small moment that the caption of this appeal now be looked at; and then its number. That is so because it was filed in this Court over four years ago. This is not a cause where a long time passed between argument and Opinion. It was in fact argued in Abingdon about 10

weeks before the ruling at issue. However, our Main Brief with the Appendix was filed 47 1/2 months ago —— two weeks short of four years —— before argument was heard. After briefs of all parties were in by December of 1976, it was joined with the causes that were heard as Paxman v. Campbell. */ Those cases, with this, were held for decision in Monell v. Department of Social Services, 436 U.S. 658 (1978). Later our appeal was severed from those "Paxman" causes. They were argued in November 1978 once Monell was decided. Our case, of course, raised some of the same issues of municipal and officer liability under 42 U.S.C. 1983, 1981 and directly under the Constitution ("Bivens" claims) that were involved in Paxman.

The case was held for decision in Paxman and presumably by the post-ruling Motions in that appeal.

Finally it was set for argument.

Between the time of our required briefing about four years earlier and argument, Monell came down.*/

Procunier came down, followed by Baker v. McCollan, 443 U.S. 137 (1979). See Procunier v. Navarette, 434 U.S. 555 (1978).

App. 200

*/ Paxman, et al. v. Campbell, 612 F.2d 848 (4th Cir. 1980).
*/ Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978).

Then came Paxman.

And then, of course, less than four months later, on April 16, 1980, came Owen v. City of Independence, Missouri, ____U.S.____, 100 S.Ct. 1398 (1980), which largely eliminated the majority's perceptions in Paxman as they could have applied to this case. Here, Judge Blair had granted Takoma Park's Motion to Dismiss on two grounds: Monroe v. Pape and the view that the Fourteenth Amendment did not imply a cause of action against it; and for that reason he rejected our references to Cox, Singleton and Brault. **/

A week after Owen, there was Carlson v. Green, ____U.S.____, 100 S.Ct. 1468 (1980).

While the panel has reversed on Owen/Monell, it has

**/ See Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975); Singleton v. Vance County Board of Education, 501 F.2d 429, 432-433 (Winter, J., concurring and dissenting); Brault v. Town of Milton, 527 F. 2d 730, 732-735 vacated on other grounds en banc (2nd Cir. 1975) on this issue. It received at least four references in the extensive comment "Implying a Damage Remedy Against Municipalities Directly under the Fourteenth Amendment" 36 Md. Law. Rev. 123, 141 Fn. 95, 143 fn. 109 and 111 (1976). See Monroe v. Pape, 365 U.S. 167 (1965).

overlooked the Bivens issue and the remaining issues and matters hereafter noted.

We, of course, addressed Owen, Monell and Baker at oral argument.

We requested leave to file "post argument briefs" to deal with these cases and those which had interpreted Owen and Baker since our original filings.

On the day the panel issued this ruling, it denied that request. Its order is attached at Petition Appendix, pp. 6-7.

It is in this special context, this unusual time lag, and the decisions between, that cause no small part of this Petition.

First, we say, after Baker it is clear that what we charged here against the two appellees now "released" from the case — negligence — is indeed a subject that should be addressed, addressed best perhaps en banc.

A careful reading of Baker shows that the door that had been seemingly closed for many years (negligent civil rights and/or "Bivens" claims) but which were clearly charged here against both the police officer

Starkey (under Sec. 1983 and 1981) and the Bank (under Sec. 1985 and 1986) did indeed open, when Baker said in 1979 that on review of this question since Procunier, the issue is not so clear. Baker, it should be noted "was based solely on...actions after respondent was incarcerated," 443 U.S. at 143, not as here, about the initial arrest and seizure. The claim there was about detention after arrest and whether that detention was unconstitutional, 443 U.S. at 142-143. It was not, as here, a Fourth Amendment claim, a distinction discussed at length at the oral argument in this cause and evidently recognized as accurate because there is no attempt to suggest Baker's second part controls this case. It is Baker's first part that should invoke relief on this Petition because it is that which is overlooked in the Opinion.

It is necessary in order to see how the law has changed direction and what is at issue to examine how the Court addresses the negligence point in Baker v. McCollan. For ease to the references we have set that entire section in the Appendix attached (Pet.Apx. 17-18). We urge its reading and the context of its observation

that:

> "having been aroung this track once before in Procunier, supra, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush." 443 U.S. at 139.

Baker's majority found, however, that since there was no constitutional deprivation in that case in the post-incarceration claim based on cruel and unusual treatment, that the Court would "defer again consideration of the question whether simple negligence can give rise to § 1983 liability." 443. U.S. at 140.

One of the members of the panel hearing argument appeared to observe that since Baker did not resolve the question but left it open, this Court was bound to follow this Court's decision in Street v. Surdyka */ on the issue —— the case on which appellees relied. The issue is whether Street is eroded.

We state however, both to the Court en banc and to the panel, that that issue is far too important to go unaddressed.

What is left of that view after the clear implications of Baker, read especially in the light of the

*/ 492 F.2d 368 (4th Cir. 1974).

rationale of Owen and the dissenting views in Baker, ought to have received a word, a view, a position, a statement from the panel if it were to fulfill its deliberative function.

It is an overriding significant issue for en banc review and we urge that it be addressed that way if the panel refuses to do so. This case is particularly appropriate factually, because it is not a mere "mail" case or "simple negligence" issue. It has, at least, the allegations and proof that go beyond mere "mistakes" or "simple" negligence.

In this regard there is a critical material fact that would escape any casual reading of the Opinion. It directly relates to this issue of causes of action for negligent constitutional violation or conspiracy to commit them, left open by Baker.

In the Opinion and its somewhat sketchy statement of facts, it mentions the fact that there was a film of the robbery. It states that it was "developed at the FBI lab the afternoon of the robbery and was returned to the local office of the FBI engaged in the investigation" (p. 2, Opinion). The next sentence of the

Opinion then states: "At this point, it seems the FBI turned over the investigation of the robbery largely to the police" (Opinion, p. 3).

The Opinion then recites the scene later, after Mr. Clipper came to the station to inquire about his car that had been taken in the robbery.*/

It then described how on May 15, 1971, the next day, pictures of Mr. Clipper were shown to the employees from photos taken the day before -- not from the bank camera, of course. It was a one-picture show up, a fact of clear importance not noted in the Opinion. According to the Opinion, the manager "gave a positive identification" and the others gave some "belief" or "resemblance" testimony.

The Opinion then recites how Starkey testified before the Justice of the Peace and obtained warrants.

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*/ It was an unusual event indeed for anybody, if he were a participant in the robbery a few hours earlier, seen by a host of bank employees, viewed by an officer who he fired at on the scene -- and who either said he was not the man or could not identify him at all as the man shown on bank film (Vol. 1, tr. 21-24) -- and who had an unimpeachable record as a long-time government employee, a marine radiologist at the Dapartment of Commerce, was a part-time 20-year employee at the commissioned officer's mess, and who had been seen at home by unimpeachable witnesses at the time of the robbery, all uninvestigated facts. (Vol. 4, tr. 6-13; Vol. 1, tr. 8,9,31-33).

Mr. Clipper was arrested on his second job at the officer's club that day (a Saturday) and jailed for 6 more days before release on bond.

What the Opinion fails to address; what is critical; what is undisputed; and what is vital to primary reasons for this Suggestion and Petition is the stipulated fact about film; the stipulated fact about the FBI; the stipulated fact about its availability; and the absolute, undenied, undisputed fact that that film, pictures of which were put into evidence, showed a man with a 30-pound differential from Mr. Clipper, without a mustache and clearly and certainly not George Clipper by a simple look at the picture from the film. (The man was named Coley and later found and convicted.*/).

The two issues, from those undisputed or stipulated facts whose significance or existence were overlooked, are central to this appeal: if those are the undisputable record facts —— and we will establish in a moment that

*/ Indeed the only similarity between the two was that both Mr. Clipper and the true culprit were black. That fact and the well-known difficulty of some whites (all of the bank employees and Starkey were white as the record shows) to identify differences between blacks is noted in a key case wholly omitted from consideration yet very close to this in its facts. It is referred to hereafter and even attached to this Petition, for easy reference. See Watzek v. Walker, 14 Ariz.App. 545, 485 P.2d 3 (1971) (Pet.Apx. 8-16).

they are precisely that —— then (a) Starkey and the Bank could be deemed grossly or something more than "simply negligent" in this circumstance (or negligent enough to invoke the reserved issue in Baker v. McCollan) in failing to use those available pictures before doing anything so drastic as taking away Mr. Clipper's liberty in this circumstance; (b) and as to Starkey, the officer, that would clearly apply both under 1983 and the Constitution; as to the Bank and its Sec. 1985 and 1986 involvement, that evidence shows clear negligence in failing to require its employees to examine the film particularly where it was clear that there was no certainty (the manager's affidavit in fact did not show a positive identification, but only a "resemblance" and in fact described a man about 30 pounds lighter than Mr. Clipper, grey, without a mustache and not at all like Mr. Clipper). It was Plaintiff's Exhibit 15. It is set forth in our Reply Brief Appendix at pages 1-2, for easy reference and in it Mr. Mohler, the manager, states "All those viewing the pictures agreed that plaintiff resembled the robber..." (Reply Br.App. 2, See also Vol. 4, tr. 46-57).

In short, sitting in that film, developed about 24

hours before Mr. Clipper's arrest was the indisputable clear picture of the culprit who could not be mistaken for Mr. Clipper.

One day before the arrest, they had it. And it was just as if it were in Starkey's desk and he refused to look at it. If that does not invoke the Baker v. McCollan reservation, we do not know what does.

How this Opinion overlooks the critical significance of that fact, we are at a total loss to explain.

As we have seen there is an implication that the FBI was really involved.

That is a total overlooking of the Stipulation at pp. 115-119 of the Record (App. 115-116; R. 586).

It is a Stipulation as to the FBI testimony.

It indisputably shows that Takoma Park was totally in charge of the matter; that the robbery took place at 1:20 in the afternoon of Friday, May 14; that the FBI simply provided developing of film facilities because it had them, i.e., "technical assistance and make its laboratory personnel available to process" evidence submitted; that in this case the FBI developed the bank film as a routine accomodation to Takoma Park

Police Department; that it was fully developed by 3:40 p.m. that afternoon about 2 hours and twenty minutes after the robbery; and that while it was held by the FBI over the weekend "at no time between the date of the robbery" and the date Mr. Mulholland, the agent, returned the prints (a week after the robbery) "did Takoma Park Police Department request the film and prints developed at the FBI Lab". (App. 119; Pet.Apx. 20)

Indeed it appears —— and this is the critical fact, the overlooked fact, the fact of at least plainest negligence coming within the Baker reservation (and the claim of constitutional insufficiency to the defense of good faith) —— "had such a request been made," said the FBI agent, "as Case Agent in charge I would have been notified and would have turned the prints over to Takoma Park Police Department immediately." (emphasis added, App. 119; Pet. Apx. 20). As he said, the FBI provided the service as "a routine accommodation" and that was its status (Pet.Apx. 19).

That stipulation is at least critical; it is omitted, it is overlooked. And so is its significance.

Nowhere in the Opinion do we find that Takoma Park was wholly in charge; that the FBI was no more, for this

purpose, than a provider of "technical assistance" — a processor of film the same as any professional company; acting only as an "accommodation" party. Nowhere, that the film was ready 2 hours and 20 minutes after the robbery; and nowhere that if Takoma Park or even the Bank through Takoma Park, simply asked, it would have been "made available" immediately. These critical "historical" facts, missing from the Opinion, create the critical "constitutional" facts.

They form the basis of what is constitutionally required of officers and the persons involved in this circumstance and what is constitutionally permissible to the "good faith" defense. That is the issue overlooked. That is the en banc issue.

Lack of film facilities in Takoma Park is not a constitutionally permissible defense, we insist, particularly when all they had to do was ask; call; phone.

With this stipulated fact of undisputed FBI testimony — the critical factors of which are wholly overlooked in the Opinion, we suggest that whatever the perception of any panel about claims of this kind, the record cannot be ignored.

The FBI "accomodation" in this case is simply not a constitutionally permissible defense or excuse. The duty to look at the available pictures could not be fobbed off on the lateness of the day --- not when an innocent man's freedom was involved. The power to arrest is too damaging to allow, constitutionally, that defense. It was constitutionally required, we say, that those pictures be seen first.

Thus: whether it be a matter of negligent liability under the Baker v. McCollan reservation; or it be a matter of what is not constitutionally allowable to a so-called "good faith" defense, or whether it be a matter of what is constitutionally required before the defense will be permitted, Starkey and the Bank had to meet those tests, urged, but wholly overlooked in the Opinion.

The issue is not about evidentiary sufficiency, then, as the Opinion appears to assume, but constitutional sufficiency.

* * *

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 1986. Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85–554, § 1, 72 Stat. 415.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85–554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88–439, § 1, 78 Stat. 445.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85–315, Part III, § 121, 71 Stat. 637.

APR 21 1981

Pet. No. 80-1500

SUPREME COURT OF THE UNITED STATES
October Term 1980

GEORGE CLIPPER, Petitioner,

v.

GRANT A. STARKEY
And
NATIONAL PERMANENT
SAVINGS AND LOAN ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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April 20, 1981

QUESTIONS PRESENTED FOR REVIEW

1. When a municipal police officer obtains a valid warrant and arrests and confines an innocent person under that warrant, is the alleged negligence of the officer and his witnesses during the pre-warrant and confinement stages actionable under §1985 as a conspiracy to deprive the innocent person of his civil rights?

2. When a plaintiff in a diversity case alleges separate causes of action based upon State common law torts of false arrest, false imprisonment and malicious prosecution, both substantively and as the basis for civil rights claims, is the United States District Court authorized, under §1988, to permit that plaintiff to "take the benefits of ... State law without its detriments to aid in expanding the federal remedy?"

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BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents National Permanent Federal Savings and Loan Association (National Permanent) and Grant A. Starkey (Starkey) deny Petitioner's contention that he sought relief under 42 U.S.C. §1986. That was not cited in either complaint, nor was it mentioned during the trial. More-

over, no such action could have been sustained by the District Court because neither complaint was filed within one year after the alleged cause of action accrued.

Respondent National Permanent also denies Petitioner's statement that his clain against it involved 42 U.S.C. §1983. Petitioner voluntarily abandoned that claim prior to the Trial Judge's initial decision on National Permanent's Motion for Summary Judgment (App. 19).

STATEMENT OF THE CASE

The Respondents are not dissatisfied with the Petitioner's description of the proceedings below, except for the statement that the Petitioner sought recovery for willful and negligent wrongs. Neither complaint alleged a cause of action grounded upon negligence.

With respect to the facts, the Respondents adopt the facts set forth in the per

curiam opinion of the United States Court of Appeals for the Fourth Circuit (App. 1-5).

ARGUMENT

1. WHEN A POLICE OFFICER OBTAINS A VALID WARRANT AND ARRESTS AND CONFINES AN INNOCENT PERSON UNDER THAT WARRANT, THE ALLEGED NEGLIGENCE OF THE OFFICER AND HIS WITNESSES DURING THE PRE-WARRANT AND CONFINEMENT STAGES IS NOT ACTIONABLE UNDER §1985 AS A CONSPIRACY TO DEPRIVE THE INNOCENT PERSON OF HIS CIVIL RIGHTS.

Were the instant case to be tried today, the alleged negligence of Respondent Starkey could not be the basis for a claim against him under §1982.[1] That precise issue was decided in Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689 (1979), wherein the Court said at page 2695 that the negligent detention of an innocent person for three

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1 At the trial in 1976, the jury found in favor of Respondent Starkey on the Petitioner's claim under §1983 that there was no probable cause for the arrest and, therefore, his constitutional rights were violated (App. 93-98).

days after his arrest pursuant to a facially valid warrant would not give rise to a claim under §1983 because the statute imposes liability for the deprivation of constitutional rights and the Constitution "does not guarantee that only the guilty will be arrested."

The rationale of Baker v. McCollan, supra, applies equally to the Petitioner's claim that he is entitled to recover under §1985(3), because the Respondents negligently conspired to arrest and detain him. Even assuming that human beings are capable of conspiring negligently, the conspiracy must be for the purpose of depriving an individual of constitutional rights before it gives rise to a separate claim under the civil rights conspiracy statute.

2. WHEN A PLAINTIFF IN A DIVERSITY CASE ALLEGES SEPARATE CAUSES OF ACTION BASED UPON STATE COMMON LAW TORTS OF FALSE ARREST, FALSE IMPRISONMENT AND MALICIOUS

PROSECUTION, BOTH SUBSTANTIVELY AND AS THE BASIS FOR CIVIL RIGHTS CLAIMS, THE UNITED STATES DISTRICT COURT MAY NOT, UNDER §1988, ALLOW THAT PLAINTIFF TO TAKE THE BENEFITS OF STATE LAW WITHOUT ITS DETRIMENTS TO AID IN EXPANDING THE FEDERAL REMEDY.

The Trial Judge correctly held that whenever an arrest is made pursuant to a valid warrant, under the law of Maryland a defendant cannot be liable for false arrest or false imprisonment, both being the same tort at common law. In that situation, a plaintiff who contends that there was no probable cause for his arrest and confinement may recover only for malicious prosecution.

The Petitioner argues that by the simple expedient of alleging that his arrest also was an act in furtherance of a civil rights conspiracy, the United States District Court was empowered under §1988 to disregard the State's interpretation of its common law and to find, as a matter of law,

that the existence of the valid warrant did not bar recovery for false arrest and false imprisonment. Petitioner contends that this should be allowed in order to "expand" the federal remedy.

This argument ignores the unambiguous language of §1988, which provides that whenever federal civil rights laws are deficient, the common law of the State shall govern unless the common law is inconsistent with the Constitution and laws of the United States. Petitioner has suggested no such inconsistency with respect to the law of Maryland on false arrest and false imprisonment because, Respondents submit, no inconsistency exists.

CONCLUSION

The Petition for writ of certiorari to the United States Court of

Appeals for the Fourth Circuit should be denied.

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CERTIFICATE OF SERVICE

This is to certify that 3 copies of the Brief in Opposition were mailed, with first class postage prepaid, this 20th day of April, 1981 to the following counsel of record in the cause below:

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Petition No. 80-1500

SUPREME COURT OF THE UNITED STATES

October Term 1980

GEORGE CLIPPER,

Petitioner,

v.

GRANT A. STARKEY
And
NATIONAL PERMANENT
SAVINGS AND LOAN ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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For Reply Brief to the Brief in Opposition, Petitioner suggests as follows:

1. The Questions Presented in the "Opposition" are helpful to the points of Petitioner in certain respects. They point up that the first critical issue

is indeed about when "negligence" is "actionable" under the civil rights statutes. (Resp. Brief p. 1.) That concession is then followed by arguing the scope and holding of Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689 (1979). It is plain, as we briefly expand upon hereafter, that the Respondents' Opposition to the Petition clearly misreads Baker, omitting that it expressly does not address Fourth Amendment claims.*/

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*/ This Petitioner's main Question Presented noted that the negligence issue he asked to be heard was not decided in Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855 (1978) and was expressly reserved by Baker v. McCollan, supra. We think it very pertinent that almost three weeks after our petition was filed, it was reported this Court heard argument on the negligence issue on March 2, 1981, in the cause known in this Court as Parratt v. Taylor, No. 79-1734. See, Taylor v. Parratt, 620 F.2d 307 (8th Cir. 1980) (unpublished opinion), cert. granted ____ U.S. ____, 101 S.Ct. 315 (1980); argued March 2, 1981, 49 U.S.L.W. 3697 (March 24, 1981). The result of that argument could resolve the issue here or induce the further need for the writ at bar, as we note hereafter.

Respondents' "Questions" and their argument in this regard, however, are helpful not only for this reason --- they wrongly see Baker as dispositive, particularly given the dissent's analysis in Baker and the majority's emphasis in Baker that the issues it addresses are post-arrest and post-detention issues. Their reliance on Baker underscores its unanswered areas, some of which are addressed in its dissent. Since Baker arose from a common situation that is replicated by and similar to many facts at bar, all of which encourage the granting of the writ, we later address its further pertinence in some additional references.

Respondents' "Questions" are also helpful to our second issue involving the selective use of 42 U.S.C. § 1988, for remedial purposes, to employ "the benefits of ... state law without its detriment to aid

in expanding the federal remedy" (Brief in Opposition at page 1). By this, we mean we should be able to reject state procedural impediments but take its substantive benefits, if less restrictive than federal law. Here the benefit of state substantive law is in its holding that deprivations of liberty resting on "false arrest" and "false imprisonment" do not depend on actual intent or good faith and can exist "with or without probable cause." See Great Atlantic and Pacific Co. v. Paul, 256 Md. 643, 261 A.2d 731, 738-40 (1970), cited and considered in the pre-trial order of the trial court below (App. 22), that struck the false arrest and false imprisonment claims at issue.

We urge that under § 1988, viewed in its remedial aspect, one is allowed to reject a procedural "detriment" of state

law but retain the substantive law which expands the remedy. Our state "detriment" is that where there is a warrant, the state procedure converts the liberty deprivation of a false arrest to a malicious prosecution claim. See Brewer v. Mele, 257 Md. 437, 298 A.2d 157, 159 (1972), also cited in the trial ruling below on the issue raised (App. 23-36). Our point, expanded on briefly hereinafter, is that this Court has not but should resolve whether, given the federally created remedy of the civil rights acts, a plaintiff deprived of substantive liberty can synthesize the state substantive law that is most favorable to his claim (here deprivation resting on false arrest claims that do not depend on probable cause), while rejecting state procedural limits to those principles that prevent their application whenever a warrant is merely sought. We note that Prosser on Torts

(4th ed. 1971) appears to make this very distinction clear: false arrest and imprisonment are in "Chapter 2. Intentional Interference with the Person" (Sec. 11). Malicious prosecution appears twenty (20) chapters and 108 sections later in its Chapter 22 under the title "Misuse of Legal Procedure". See Prosser on Torts (4th ed. 1971), Chapter 2 and Sec. 11; Chapter 22 and Sec. 119.

Warrants are irrelevant to substantive deprivations.

In Reply to the observations of Respondents, we not only urge the foregoing. We also suggest that while both the majority and dissent in Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991 (1978) and Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151 (1972) arrived at different results, the analyses of the relation between and among the purpose of

§ 1983, federal remedial law, state substantive law and the use of § 1988 there considered, do indeed support our view; at least our view that our § 1988 issue is of sufficient moment to warrant further review and the grant of the writ.

2. As to remaining parts of the Brief in Opposition, particularly some implications not directly clear that neither negligence nor § 1988 were allegedly charged in the complaint and § 1983 was dropped as to the bank, we are compelled to underscore that these implications are not only inaccurate but Respondents carefully avoid the pre-trial order which expressly, clearly and fully alludes to them. If their reference to the complaint was merely intended as an aside (such references were in the complaint as well), it is both inaccurate and made meaningless by the pre-trial order to which we allude hereafter. The fact that § 1983

was dropped as a basis for bank liability does not affect the § 1983 liability of the police officer, Mr. Starkey, a point not really addressed in the Brief in Opposition; and of course it does not affect the bank's § 1985 joint liability.

I.

We have underscored that Respondents misread Baker. Baker, we emphasize, "was based solely on ... actions after respondent was incarcerated," 443 U.S. at 143 (emphasis added). It was not, as here, about the initial arrest and seizure. The claim there was about detention after arrest and whether that detention was unconstitutional, 443 U.S. at 142-143. Our point is that what it did not decide --- a Fourth Amendment claim based on negligence "plus" --- should be decided. Baker expressly stated this as to the negligence issue:

> "[H]aving been around this track once before in Procunier, supra, we have come to the conclusion

> that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush." 443 U.S. at 139.

Baker's majority found, however, that since there was no constitutional deprivation in that case in the post-incarceration claim based on cruel and unusual treatment, that the Court would "defer again consideration of the question whether simple negligence can give rise to § 1983 liability." 443 U.S. at 140. In view of that statement, we find Respondents' reliance on Baker surprising.

The fact is that the Fourth Circuit continues to follow its decision in Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974), on the issue --- the case on which Respondents relied below (Bank's Brief, p. 13).

The Baker majority did observe that not every person who is innocent and wrongfully arrested will automatically have a civil rights constitutional claim:

> Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions (note but in Maryland eliminated when there is a warrant), is largely irrelevant to his claim of deprivation of liberty without due process of law (footnote omitted). The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted --- indeed, for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of Rights 'without limits.' Patterson v. New York, 432 U.S. 197, 208 (1977). 'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' Ibid. 443 U.S. at 145.

By the same token, it seems no less appropriate to observe, using in part the analytic approach of the dissent in Baker, that merely because an officer may have a claim to probable cause, still, if he fails to use readily available facts of the kind at bar --- a bank photograph of the true culprit --- he should be denied the defense of good faith as a matter of law, or be liable by federal

standards based on negligence or "negligence plus grounds" that do not permit refusal to glance at indisputable facts of innocence immediately at hand. Undeniably, since it is undisputed by virtue of an FBI Stipulation at bar that the bank photographs in our case showing the actual bank robber were available 24 hours before the arrest; and since, if they were examined by the officer or the bank employees involved, this innocent party would have never been arrested, Baker should mean there are some duties that cannot be ignored. If either the photographs were looked at, or the officer (Mr. Starkey) had even made a simple contact with readily available witnesses, including a District of Columbia policeman, or an unimpeachable next door neighbor, the arrest also would not have occurred.

If, as Baker's dicta noted, "not every conceivable step" is required by due process to eliminate convicting the

innocent," it does require a few critical ones to meet a constitutionally permissible defense to a Fourth Amendment violation pursued through § 1983 or § 1985.

The Brief in Opposition argues that Mr. Starkey obtained arrest warrants. So he did; but he did so by not mentioning or seeing the bank pictures showing innocence, or by not telling the magistrate of multiple witnesses never contacted who indisputably saw Mr. Clipper at his home at the time of the robbery.*/ Due to the jury's finding, we arguendo ignore for our purposes, the fact that his "statements" were said by him to be in the form of an affidavit when none existed or that the hearing was not transcribed (since it occurred before magistrates had to be judges). Taking only his admissions and what he states he said, he did not tell the magistrate about what is at issue here --- his negligence regarding the failures to use the

*/ Critical also to recall, and ignored by Respondents was that there was a single picture show-up.

bank photographs or his failure to contact any offered witnesses to confirm that Mr. Clipper was elsewhere at the time of the crime. Even if this indisputable fact were not so, the issue remains: whether --- as a matter of the constitutionally permissible or constitutionally sufficient and not merely the factually sufficient --- a warrant is in itself justification to avoid negligence in § 1983 cases, with or without a one picture showup.

If neither the Constitution nor § 1983 will guarantee that only the guilty will be indicted, each ought to guarantee that a modest effort will be made to find innocence if it is readily available.*/

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*/ There are degrees, of course --- the very reason for the grant of the writ. If, for example, the officer, or employees, had no actual or reasonable notice of the evidence, or if there was a special emergency not involved here, that is one case. Where, however, it is conceded that critical proof is either available or could be available before arrest, and the Respondents are aware of its existence (even if not the exact time it was available), all reflected here in the FBI Stipulation agreed to by both Respondents (App. at 59-61), any negligence in failing to examine it cannot be considered merely careless, as a matter of law; nor may the jury instructions directed to those points be denied, as here. A one picture show-up, as here, should also matter.

These factors apply to the officer under both our § 1983 and constitutional claim. They also apply to the bank under § 1985. It cannot fairly be said that banks and their personnel, who are generally properly trained in dealing with robberies, can be treated as ordinary citizens who are suddenly presented with an unexpected event.

The average citizen does not carry around a portable camera that could identify --- as here incontrovertibly --- one who may assault him.

Banks have those tools available both in fact and in training of their personnel. Therefore, their liability is no less in issue on the same principles applied to Mr. Starkey.

The Brief in Opposition simply does not address this obvious fact.

Nor does it address meaningfully the constitutional effect of the show-up procedure or even that it is at least negligent.

II.

We have already observed that this Court recently heard oral argument in another case involving an unpublished opinion regarding negligence, Parratt v. Taylor, No. 79-1734, whose argument was reported in 49 U.S.L.W. 3697 (March 24, 1981). That case and its result is a still further reason for the grant of the writ either because it may resolve our issue or because we reach what it does not, depending on its result.

Negligence in mail arrangements or prison activities or the like may be one thing; quite another, as the Baker dissent appears to underscore, at least by analogy, is the failure by officers and employees of the kind charged here --- while each is supposedly knowledgeable of the terrible consequences of any error involved in arrest activities. The Respondents' reliance on Baker not only emphasize our points; Parratt may well confirm them.

III.

Presumably because they knew that the critical document which guided the proceedings at issue here --- the Pre-Trial Order signed by the Court --- covered every claim raised in the Petition with precision (including negligence and 42 U.S.C. § 1983 against the officer although dropped against the Bank, 42 U.S.C. § 1985 against both and 42 U.S.C. § 1988 against both) --- the Respondents in their Brief in Opposition do not mention, but attempt only by omission or largely by negatives, to imply that perhaps those issues were not raised. Fortunately, they do, however, finally touch them, except for the officer's liability under § 1983.

The Pre-Trial Order, signed by the Court, filed on January 19, 1974, referred to repeatedly in our Petition and appearing at App. 51-58 to our Petition and at R. 571 in the record, states this in its opening portion:

"(captioned omitted)

PRE-TRIAL ORDER (R. 571)

1. The plaintiff's statement of facts and contentions with respect to all defendants are as follows: The plaintiff, George Clipper, brings these actions, now consolidated, for compensatory and punitive damages against the defendants based on federal jurisdiction and diversity jurisdiction and under the Constitution of the United States and pursuant to Title 42 U.S.C. Section 1981 through 1988 and Title 28 U.S.C. Sections 1331, 1332, and 1343, and as to the defendant bank, which is a federally chartered institution, pursuant to applicable federal laws pertaining to it. The suit for such damages is based on alleged willful, negligent and unconstitutional wrongs violating Mr. Clipper's constitutional rights and injuring, invading or impairing his right and interest in being free from restraint and bodily interference. Mr. Clipper claims that he was wrongfully arrested, imprisoned and confined by the defendants or at their instigation and as a result of their conspiracy; and that they acted without probable cause and in bad faith and with malice and out of racial motivation; and that they failed to correct the wrongs when able to do so; and each acted for the other. (C.A.App. 98; R. 571) As a result Mr. Clipper asserts that their actions constitute violations of his constitutional

rights, the Civil Rights Acts and constitute the common law torts of false arrest, false imprisonment and malicious prosecution. Further and without regard to the intentional wrongs he has alleged and asserts negligent wrongs in this regard resulting in his wrongful arrest and confinement and wrongful charges and prosecution, and the negligent failure to prevent or end the same. (Emphasis added to show §§ 1983, 1985-6, and 1988 guided the trial as did negligence, after Takoma Park was dismissed.)

The claims of the plaintiff in this regard are against each of the defendants, National Permanent Federal Savings and Loan Association, the bank involved, and Grant A. Starkey, the police officer involved. (Former defendant Prince George's County was dismissed by stipulation upon specific representations of its non-involvement; and the court granted a summary judgment to defendant Takoma Park, Maryland.) (Emphasis added.)

The remainder of the pre-trial Order, including a portion inadvertently omitted from the Appendix to the Petition following the above, is even more specific about negligent acts before arrest and might therefore be further examined (at

Reply Apx., 1-6). It even reflects the Respondents' defense of no "negligent invasion of Mr. Clipper's rights." (Reply Apx., at 4.)

The implications, by indirection, in the Brief in Opposition that neither negligence nor § 1988 was involved by referring to the Complaint and not the Pre-Trial Order is therefore specious, wholly apart from the fact that those elements are clear allegations in that first pleading. Even if they were not, complaints are amended and it is the Pre-Trial Order that guides the cause under Federal Civil Rule 16.*

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*/ Contrary to the implications, perhaps unintended, that the Complaint did not make these references, the original complaint against both Starkey and the bank, separately filed at first and as the pre-trial order stated later consolidated, specifically alleged that the statutes involved included "42 U.S.C. 1985 et seq." (emphasis added, App. 159 as to the bank, App. 174 as to Starkey) and in four places at least referred to negligent acts by each (e.g., App. 166-167, para. 6 referring to failing or neglecting to take "reasonable action" or "make all reasonable and necessary factual investigation" regarding the charges permitted by "the negligent, willful and wrongful acts of this defendant Bank." See also para. 7, App. 167; App. 170, para. B for same "neglecting" and similarly, as to Starkey at App. 177, 184, para. B; App. 185, para. D).

§ 1983 through § 1988 and negligence claims as to both Respondents not only clearly appear in this pre-trial order (supra and Reply Apx., 1-6), they also do appear in the Complaint as the references footnoted below clearly show.*/ Our regret is only that comments in the Opposition Brief appear to require the record points noted in this Section.

IV.

The writ should issue.

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*/ See App. 159 and 174 referring to 42 U.S.C. 1985 et seq. and negligence found in the Complaint, e.g. App. 166-167, para. 6; para. 7, App. 167; App. 170, para. B; App. 177, 184, para. B; App. 185, para., as just noted.

CONTINUATION OF PRE-TRIAL ORDER
AT R. 571 IN RECORD AND APP. 51-58
TO PETITION, C.A. APP. 98 ET SEQ.

The facts which support these contentions show this: that an arrest of Mr. Clipper was made on May 15, 1971 at the Officers' Mess of the National Naval Medical Center in Bethesda where he held weekend employment; that the arrest was made pursuant to arrest warrants obtained by the defendant Starkey upon his oath; that the defendant Starkey accompanied by Montgomery County Police officers effected the arrest in the evening of Saturday, May 15 at that employment; that Mr. Clipper was brought to the Bethesda Police Station for processing to the Hyattsville Police Station where he remained over the weekend and transferred to the Upper Marlboro jail; that the charges were for assault with intent to kill, kidnapping, armed robbery and bank robbery arising from events taking place at defendant's bank in (C.A. App. 99) Langley Park, Maryland on May 14, 1971 the day before his arrest and confinement; that a bond was set of approximately $125,000; that he remained in the jail for approximately a week until released on the reduced bond of approximately $10,000 put up by his family;* that he was

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* In our Statement of Facts in the Petition the bond was erroneously noted as $1,000.

returned to court at least twice and that those charges remained outstanding until they were dismissed by a 'nol pros' in July 1975; further, that Mr. Clipper did not commit any of the offenses criminally charged nor did he participate in, or was involved in them. It was alleged in the complaint and is undisputed here that two of the individuals involved, namely Garlan Lathan and John David Wood were participants in the robbery and were seized at the scene by the police involved, and particularly Officer Henry Wortman, the arresting officer; and that the third member, first claimed to be Mr. Clipper was, in fact, one Russell Coley who was later apprehended. It is undisputed and stated in the complaint that Garlan Lathan is the son-in-law of the plaintiff and the vehicle used in the robbery was registered in Mr. Clipper's name.

It is the contention of the plaintiff, however, that other circumstances surrounding that registration and as set forth in the complaint and in his testimony show that this did not make out 'probable cause' for his arrest, and in any event the defendants acted negligently in restraining or causing the restraining of his liberty. In this regard plaintiff asserts that it appears that the defendants were told where Mr. Clipper was at the time of the events and made no effort to verify his contentions; that Lathan had told them he had not seen (C.A. App. 100) Mr. Clipper and that Mr. Clipper was not involved; that

Officer Wortman who was the arresting officer told them Mr. Clipper was not involved and put them on such notice some 24 hours before Mr. Clipper was arrested; that there were pictures showing the true culprit (Mr. Coley) which either were intentionally or negligently not looked at and would have shown that any identification of Mr. Clipper was wrongful; that the defendants concealed or failed to notify others of the efficacy of the bank camera and pictures; that the defendants (or the authorized employees of the bank and defendant Starkey) actually knew their alleged 'identifications' of Mr. Clipper both before and after the arrest, confinement and bringing of and continuing of the charges; or they acted with negligence in making such 'identifications' knowing that they would result in the arrest, confinement* and restraints on Mr. Clipper here involved; and Officer Starkey also knew this and they acted for each other. The plaintiff asserts that these events were racially notivated, that a white man would not have received the same treatment both before and after the infliction of the wrongs and the restraints on his liberty. The willful and negligent wrongs of the employees are imputable to the bank. Further, in addition to the negligence of its employees,

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*Reply Brief App. at 55A. Unfortunately, in the Appendix filed with our Petition, it appears that one section of the Pre-Trial Order, equal to a page, was omitted in the printing. What follows hereafter is that omission, which we append as a supplement to the original record to be inserted as "App. 55A." It is attahced to this Reply.

the bank was negligent in failing to supervise them properly in this matter or set forth proper rules or procedures earlier, including requiring them to examine the bank's camera of the events before making (C.A. App. 101) an identification. The plaintiff denies the defendants acted in good faith. Plaintiff also rests on sum-total of alleged facts to support all claims.

2. The defendants deny that they either willfully or negligently violated the rights of the plaintiff, and they deny that he is entitled to recovery against them for the alleged false arrest, false imprisonment or malicious prosecution, or negligent invasion of his rights or interests. Specifically, defendant bank* further states as follows: (1) that National Permanent's employees did not take any affirmative steps by request, persuasion or otherwise to cause the arrest of the Plaintiff; (2) that National Permanent's employees had no knowledge that their identification was wrong, and they reasonably believed in the truthfulness of their identification; (3) that Plaintiff's race was not a motivating factor behind National Permanent's employees'

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*End of C.A. App. 55A. It will be noted that in the pre-trial order they --- the Respondents --- deny "negligent invasion" of Mr. Clipper's rights or interests.

identification, and they did not seek to injure Plaintiff in any way because of his race; and (4) that none of National Permanent's employees entered into any kind of conspiracy to deprive Plaintiff of any rights he had ... (Omitted are further statements at App. 56-58, which cover the defendants further claims and damages because they are not pertinent to what was raised.)

and restraints on Mr. Clipper were involved; and Officer Starkey also knew this and that they acted for each other. The plaintiff asserts that these events were racially motivated, that a white man would not have received the same treatment both before and after the infliction of the wrongs and the restraints on his liberty. The willful and negligent wrongs of the employees are imputable to the bank. Further, in addition to the negligence of its employees, the bank was negligent in failing to supervise them properly in this matter or set forth proper rules or procedures earlier, including requiring them to examine the bank's camera of the events before making an identification. The plaintiff denies the defendants acted in good faith. Plaintiff also rests on sum-total of alleged facts to support all claims.

2. The defendants deny that they either willfully or negligently violated the rights of the plaintiff, and they deny that he is entitled to recovery against them for the alleged false arrest, false imprisonment or malicious prosecution, or negligent invasion of his rights or interests. Specifically, defendant bank